# WAR IN ISLAMIC LAW:
# JUSTIFICATIONS AND REGULATIONS

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ABSTRACT

This study examines the justifications and regulations for going to war in both international and domestic armed conflicts under Islamic law. It studies the various kinds of use of force by both state and non-state actors in order to determine the nature of the Islamic law of war, specifically, whether Islamic law sanctions “holy war”, offensive war or only defensive war. It discusses international armed conflicts, i.e., war against non-Muslims, in the first four chapters: Chapters One, Two and Three treat the justifications for war in the *Sīrah* (biographies of the Prophet) literature, *Tafsīr* (exegesis) literature, and classical and modern juridical literature respectively. Chapter Four treats the Islamic regulations for war in international armed conflicts. Chapter Five is devoted to the justifications and regulations for the use of force in internal armed conflicts. It investigates the permissibility under Islamic law of resorting to the use of force to overthrow the governing regime and discusses the Islamic treatment of terrorism and the punishment of terrorists and their accomplices. It also discusses the claim that contemporary acts of domestic and international terrorism perpetrated by Muslims are motivated and justified by jihād. This study is limited to the four Sunni schools of Islamic law and also refers in some cases to the extinct Ẓāhirī school. It studies the writings of classical and modern Muslim jurists and scholars and compares them with the Western literature on the subject.

This study finds that jihād, in the sense of international armed struggle, as the term is currently used, is a defensive war justified in cases of aggression on the Muslim nation and *fitnah*, i.e., the persecution of Muslims. It also finds that the core justification in Islamic law for the use of force in domestic armed conflicts, and which may give an indication to future conflicts in the Muslim world, is the violations of the rules of the sharīʿah. The study concludes that the Islamic law of war as maintained by the majority of mainstream Muslims scholars has great potential for contributing to international peace and security in the modern world, particularly with regard to the humanization of armed conflicts and the peaceful resolution of internal conflicts.

# DEDICATION

To my mother, my father, Hisham, Doʿa’ and Muhammad. Also dedicated to anyone interested in the subject.

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# TRANSLITERATION TABLE

**Consonants:**

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| ا | ’ | د | d | ض | ḍ | ك | k |
| ب | b | ذ | dh | ط | ṭ | ل | l |
| ت | t | ر | r | ظ | ẓ | م | m |
| ث | th | ز | z | ع | ‘ | ن | n |
| ج | j | س | s | غ | gh | ه | h |
| ح | ḥ | ش | sh | ف | f | و | w |
| خ | kh | ص | ṣ | ق | q | ي | y |

**Short Vowels:**

| | |
|---|---|
| *fatḥah* َ | a |
| *kasrah* ِ | i |
| *ḍammah* ُ | u |

**Long Vowels:**

| | |
|---|---|
| *ālif* (ا) | ā |
| *yā’* (ي) | ī |
| *wāw* (و) | ū |

**Diphthongs:**

| | |
|---|---|
| وَ- | aw |
| يَ- | ay |

*Hamzah* (’) is omitted at the beginning of a word.

Final *hā’* (ة) is transliterated (*h*).

# INTRODUCTION

A few individuals create ideas, arguments, theories, ideologies, laws or a specific understanding or interpretation of an issue. Even when part of a religion is believed to be from the Divine, a few individuals still offer their own understanding of such divine material and attempt to infer the divine intention that lies behind it. The great majority of the rest of the human race and other creatures often become directly or indirectly influenced, or sometimes victimized, by either believing in or becoming the target of such ideas, arguments, theories, ideologies or interpretations based on divine material. Some ideas and theories become a driving force that dictates the course of human actions towards other humans and the rest of creation. They also regulate, no less importantly, how people deal with themselves – their own desires and physical needs.

Such ideas, arguments and theories, although they may be produced by an individual, sometimes develop into widely held strong beliefs, religions, truths and ways of life which constitute a core component of what divides humanity into different civilizations, cultures, faiths, ideologies and even nations. On the one hand, such ideas and theories become products that generate a sense of identity, including respect for and acceptance of others or hatred and animosity towards them. On the other, they also turn into a commodity which becomes widely accepted among certain people while totally rejected by others. Peace, genocide, the Holocaust, international and even civil wars are all examples of human actions usually motivated by specific ideas, arguments and beliefs about an “other”, and whether this “other” is viewed as belonging to a different ethnicity, religion, sect, ideology, civilization, etc.

In the arena of the study of ideas and theories, researchers – generation after generation – sometimes produce particular interpretations or even theories about the original ideas or theories they are studying. At a certain point, the true meaning and nature of the original theory or idea become disputed, confused and contested, depending on which and whose view, interpretation and literature the researchers are studying. But throughout its history, a theory or a law sometimes becomes like a living creature that develops and changes, first, according to the one who is creating it or writing about it and, second, according to the context in which it is applied.

Among the most important theories are those that shape relations towards the others because such theories become either a source of peaceful coexistence, setting the rules for just and equitable relations, or a source of hatred and demonization of others, which may lead to the use of violence. In a word, theories and ideas about others may sometimes become a sort of a weapon of mass destruction, as has been witnessed throughout the various stages of human history. Anti-Semitism and racism are prime examples.

This study examines one theory, or more precisely a law, namely, the Islamic law governing the use of force in both international and domestic conflicts. One of the most complex fields in the study of "others" is the study of their religion. This is because an outsider tends to interpret and judge the religion of others through the historical, religious and cultural experiences which have formed her/his own intellect. Furthermore, the complexity is doubled in case of the study of the law of war in the religion of others because outsiders may find themselves to be the enemy according to the law of war they are studying. Thus, the insider/outsider methodology, as explained below, can be a very useful approach in the study of religion, war, history and international relations.

## 1. Rationale

For the West, Islam has been for centuries a source of fear and suspicion. Orientalists have depicted the religion and culture of Islam as inferior to the religion and culture of the West.[1] But more importantly, for these and for other reasons, Islam has been a source of misunderstanding. According to the words of Reuven Firestone, "Islam is perhaps the most misunderstood religion to the West, and many stereotypes still hinder clarity about its tenets and practices. Western prejudice toward Islam is as old as Islam itself."[2] This misunderstanding has created a yawning gap and even contradictory readings between insider/Islamic and outsider/Western scholarship in many areas of the study of Islam. But of the many areas of misunderstanding, as James Turner Johnson clearly puts it, "between Western and Islamic culture there is possibly no other single issue at the same time as divisive or as poorly understood as that of jihad."[3] Fortunately, however, one of the main reasons for the misunderstanding or lack of understanding of jihād among Western scholars has been recognized by some of them. According to Johnson, Western "Scholarship on Islamic normative tradition on war is considerably less well developed."[4] He adds that "there exist no general histories treating the understanding of normative tradition on religion, statecraft, and war in Islamic societies or in Islamic religious thought. Many significant subjects remain unexplored for lack of researchers with the necessary training and language skills."[5] Fred McGraw Donner describes the

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[1] James Turner Johnson, *The Holy War Idea in Western and Islamic Traditions* (Pennsylvania: Pennsylvania State University Press, 1997), p. 21; Edward W. Said, *Orientalism*, reprinted with new afterword (London: Penguin, 2003); Edward W. Said, *Covering Islam: How the Media and the Experts Determine How We See the Rest of the World*, rev. ed. with a new introduction (London: Vintage, 1997).

[2] Reuven Firestone, *Jihād: The Origin of Holy War in Islam* (New York: Oxford University Press, 1999), p. 13.

[3] Johnson, *The Holy War Idea*, p. 19.

[4] Ibid., p. 22.

[5] Ibid., p. 23.

problem in the current state of scholarship on jihād in the West as "a practical one", suffering from the lack of "preliminary work on a vast subject."[6]

However, despite this lack of "preliminary work" and the fact that many subjects related to the study of this complex topic are still admittedly unexplored in Western scholarship, jihād has generally been portrayed in Western literature as a holy war to convert non-Muslims. For centuries, Europe's image of Islam has been associated with its spectacular spread and the wide expansion of its territories. Christian Europe was very much alarmed by this phenomenon, especially after the Muslim conquest of Spain, which remained under Muslim rule for eight centuries.[7] Moreover, there has been a tendency in the West to conceive of Islam as an inherently violent religion. Richard C. Martin confirms that the modern media and many Westerners who attempt to characterize Islam and the Arabs have concluded that there is a consciously "discernible ethos of violence in Islamic society".[8] Yvonne Yazbeck Haddad states: "The association of Islam with holy war, and of Muslims with the propagation of violence, seems to be endemic to Western awareness of Muslim faith. This is deeply disturbing to Muslims."[9]

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[6] Fred McGraw Donner, "The Sources of Islamic Conceptions of War", in John Kelsay and James Turner Johnson, eds., *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions* (Westport, Conn.: Greenwood Press, 1991), p. 57.

[7] Firestone, *Jihād*, p. 13.

[8] Richards C. Martin, "The Religious Foundations of War, Peace, and Statecraft in Islam", in John Kelsay and James Turner Johnson, eds., *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions* (Westport, Conn.: Greenwood Press, 1991), p. 108. See also Fred Halliday, *Islam and the Myth of Confrontation: Religion and Politics in the Middle East* (London: I.B. Tauris, reprinted 2003), p. 35.

[9] Yvonne Yazbeck Haddad, "Operation Desert Shield/Desert Storm: The Islamist Perspective", in Bhyllis Bennis and Michel Moushabeck, eds., *Beyond the Storm: A Gulf Crisis Reader* (New York: Olive Branch Press, 1991), p. 256. See also, for example, Jonas Otterbeck, "The Depiction of Islam in Sweden" *The Muslim World*, Vol. 92, Issue 1/2, Spring 2002, pp. 143-156. Margaret Pettygrove indicates that "The demonization and reduction of Islam in popular American culture, particularly with respect to suicide bombings and Political Islam, suggests that Islam is an inherently violent or extremist religion." Margaret Pettygrove, "Conceptions of War in Islamic Legal Theory and Practice", *Macalester Islam Journal*, Vol. 2, issue 3, 2007, p. 35. See also Muhammed Abu-Nimer, "A Framework for Nonviolence and Peacebuilding in Islam", *Journal of Law and Religion*, Vol. 15, No. 1/2, 2000-2001, p. 221.

Furthermore, in 1993 Samuel P. Huntington hypothesized in his “The Clash of Civilizations?” that “a central focus of conflict for the immediate future will be between the West and several Islamic-Confucian states.”[10] In fact, analysts have limited this conflict or clash to one between what is called “Islam” and “the West”, and the involvement of the so-called “Confucian states” in this anticipated conflict has been totally ignored. Moreover, a few years after Huntington presented his theory, the 9/11 terrorist attacks, the London and Madrid bombings, suicide bombings and hostage taking and beheadings in certain Muslim countries under occupation, brought new dimensions to the association of Islam with violence in Western literature. In the bulk of post-9/11 literature, the term jihād is used in the sense of terrorism. In other words, a line of thought in the West has related the causes of these terrorist acts to Islamic religious extremism, and particularly to jihād, rather than to specific regional conflicts and the occupation of particular Muslim countries, which are the causes stated by the terrorists themselves.

This research has therefore been driven by the two reasons referred to above, namely, first, the poor understanding, and the as yet unexplored subjects related to the study of jihād, which have led to the characterization of the current state of scholarship on it – particularly in Western literature – as “considerably less well developed”; and second, the claim that the law of war in Islam, the religion of one fifth of the world’s population, is the cause of acts of terrorism, which is a serious claim that requires scholarly investigation. For these reasons, the study of the law of war in Islam becomes not only a matter of timely relevance, but also, more significantly, a matter of strategic importance to the understanding, and political treatment, of both international and domestic conflicts and acts of terrorism in which

[10] Samuel P. Huntington, “The Clash of Civilizations?”, *Foreign Affairs*, Summer 1993, Vol. 72, No. 3, p. 48. See also Samuel P. Huntington, *The Clash of Civilization and the Remaking of World Order* (New York: Simon & Schuster, 1996).

Muslims are involved, or, more precisely, in which the teachings of Islam play, or are thought to play, a role.

### 2. Aims of the Study

This study attempts to examine the nature of the Islamic law of war – the contested, misunderstood and inadequately explored jihād. Despite the vast literature written on jihād in both Islamic and Western literature, the results of achieving this target varies according to how and where it is pursued. This study argues that the best approach is to examine both the Islamic *jus ad bellum* (the justifications for resorting to war) and the Islamic *jus in bello* (the rules regulating the conduct of war) in both international and domestic armed conflicts. The examination of each of these contributes to the understanding of the other and hence ultimately indicates the nature of jihād. What is meant by the nature of jihād here is whether it is a "holy war", either defensive or offensive, or a war of expansion for economic or other purposes. The term "holy war" is used here in the sense of a war waged either in order to convert a people to a certain religion by force, or solely because the opponents hold different beliefs. In other words, this study attempts to find out whether or not jihād is a just war. The meaning of a just war here is a war fought in self-defence that complies with the United Nations restrictions on the use of force.

Thus, the aim of this study is to examine the justifications for and the regulations of the use of force under Islamic law in both international and domestic armed conflicts. It examines all the varieties of the use of force, either by state or non-state actors, that are treated under Islamic law. In other words, it examines why and how Muslims resort to the use of force. The significance of studying the treatment of the use of force by non-state actors under Islamic law is fourfold. First,

it tests the claim that jihād is the cause of contemporary acts of terrorism perpetrated by Muslims. Second, in case of rebellion against the Islamic government, it discovers the degree of tolerance or intolerance Islamic law provides for the internal opponents of an Islamic government. Third, studying the regulations in Islamic law for the use of force in both international and domestic armed conflicts can provide pointers for possible measures for humanizing armed conflicts in which the followers of one fifth of the world's population may be involved. It also presents the Islamic positions on certain acts committed by a few Muslims, such as targeting non-combatants, beheadings, kidnapping journalists and humanitarian aid workers in specific Muslim countries, and acts of terrorism such as blowing up airplanes, trains and buses. Fourth, this study investigates the potential contribution the legal system of one of the world's largest religions may provide for the world's discussions on war and thus the impact it may have on the attainment of world peace and stability.

In the light of the findings of this examination, first, it can be decided whether Muslim calls for the recourse to jihād in international and domestic armed conflicts at the present time is justified or not, and second, and no less importantly, it can be judged whether or not these contemporary calls for jihād comply with the teachings of Islam on the use of force. In this way, the practices of Muslims can be judged according to their theory, i.e., the teachings of Islam, and thus the major error of confusing the practices of Muslims with the teachings of Islam can be avoided.

## 3. Research Questions

To achieve the above aims this study attempts to answer the following main questions:

1) What are the Islamic justifications for the use of force in international armed conflicts, namely, going to war against non-Muslims? (See Chapters One, Two and Three).
2) What are the justifications of both the Islamic state authorities and its citizens for the resort to war against each other? (See Chapter Five).
3) What are the main rules in Islamic law regulating the conduct of Muslims with regard to the lives and property of enemies during and after hostilities in international armed conflicts? (See Chapter Four).
4) What are the Islamic rules regulating the conduct of the Islamic state during and after hostilities in the various kinds of domestic armed conflicts, and what are the differences between the rules regulating these various domestic conflicts and the rules regulating the conduct of Muslims in international armed conflicts with non-Muslims? (See Chapter Five).
5) After examining the Islamic justifications and regulations for the use of force in both international and internal conflicts, this study investigates whether or not the classical Muslim jurists treat the issues of international and domestic terrorism? (See Chapter Five).
6) If the answer to the above question is in the affirmative, what then constitutes an act of terrorism and what is the punishment for terrorists and their accomplices under Islamic law? (See Chapter Five).

**4. Scope and Limitations**

This study is confined to the Sunni literature and does not include the Shiʿite literature on the subject. More specifically, it is limited to the four Sunni schools of Islamic law, i.e., the Ḥanafī, Mālikī, Shāfiʿī and Ḥanbalī schools. In some cases it

refers to the extinct Ẓāhirī school, namely, the opinions of Ibn Ḥazm (d. 456/1064). It includes the literature written in both Arabic and English. With a few exceptions, the study deals with mainstream Islamic and Western literature and does not focus on hate literature or the writings of extremists on either side. The Islamic literature surveyed includes the writings of both classical and modern Muslim jurists and scholars. The term “modern Muslim scholars” refers to the scholars who lived during the period extending from the last quarter of the nineteenth century up to the present, while the term “classical Muslim jurists/scholars” refers to those who lived during the period preceding that time.

This study examines the Islamic normative sources on the justifications and regulations for war and thus it is not a historical study. In other words, it does not follow the occasions when Muslims resorted to war, or their conduct in war throughout history, apart from the incidents of armed conflict that took place between the Muslims and their enemies during the lifetime of the Prophet. The reason of this exception is that the incidents of fighting that took place during the Prophet’s lifetime which are treated in the *Sīrah* (biographies of the Prophet) literature, along with the Qur’ān, are the bases for the formulation of the Islamic law of war, as explained below.

**5. Literature Review**

Despite the vast extent of the literature written on jihād since the first century of Islam in insider and, later, in outsider literatures, much disagreement and misunderstanding still exist about the subject, mainly regarding the Islamic justifications for going to war. This is partly attributed to the fact that classical Muslim jurists give scant attention to the justifications for going to war compared

with their extensive treatment of the rules regulating the conduct of Muslims during war. It is ironic that, contrary to the classical Muslim jurists, Western scholars have focused mainly on the justifications for jihād and almost disregarded the Islamic regulations for the conduct of war. Most probably the reason why classical jurists did not adequately address the justifications for going to war is that a state of hostility was already the norm in international relations in their times.

In fact, it took classical Muslim jurists about seven centuries until a manuscript devoted to the treatment of the justifications for war was written by the encyclopaedic Muslim scholar Ibn Taymiyyah (d. 728/1328). This manuscript, unfortunately not so far widely available, was edited and personally published in 2004 by the Saudi scholar ʿAbd al-ʿAzīz ibn ʿAbd Allah ibn Ibrāhīm al-Zayd Āl Ḥamad under the title *Qāʿidah Mukhtaṣarah fī Qitāl al-Kuffār wa Muhādanatihim wa Taḥrīm Qatlihim li-Mujarrad Kufrihim* (A Concise Rule for Fighting against Unbelievers and Making a Truce with Them and the Prohibition of Killing Them Solely because of their Unbelief).[11] Ibn Taymiyyah, as is clear from the title, first, discusses at some length and persuasively explains the evidences from the Qur'ān and the tradition of the Prophet supporting the position of the majority of his Muslim predecessors, the Ḥanafī, Mālikī and Ḥanbalī jurists, that jihād is permissible only in case of aggression by the enemy against Muslims. Second, he rejects the position maintained mainly by al-Shāfiʿī (d. 204/820) and some Ḥanbalī jurists that unbelief in itself is a justification for jihād.

Another major contribution on the discussion of the subject came from Shaykh Muḥammad Abū Zahrah (1898-1974), another prolific author, who supports

[11] Aḥmad ibn ʿAbd al-Ḥalīm ibn Taymiyyah, *Qāʿidah Mukhtaṣarah fī Qitāl al-Kuffār wa Muhādanatihim wa Taḥrīm Qatlihim li-Mujarrad Kufrihim: Qāʿidah Tubayyn al-Qiyam al-Sāmiyah lil-Ḥaḍārah al-Islāmiyyah fī al-Ḥarb wa al-Qitāl*, ed. ʿAbd al-ʿAzīz ibn ʿAbd Allah ibn Ibrāhīm al-Zayd Āl Ḥamad (Riyadh: N.p., 2004/1424).

the permissibility of jihād in cases of aggression against and religious persecution of Muslims and when an enemy prevents Muslims from preaching Islam.[12] Moreover, he shaped a new approach to the subject of international relations in Islam which is based on a number of Islamic principles including human dignity, justice, cooperation and friendship between all human beings.[13]

Ibn Taymiyyah and Abū Zahrah have had a great influence on mainstream modern Islamic writings on the subject. Wahbah al-Zuḥaylī, a leading Syrian world authority on Islamic law, provided a solid contribution on the subject in his PhD thesis submitted to the Faculty of Law, Cairo University, in 1963, first published in the same year under the title *Āthār al-Ḥarb fī al-Islām: Dīrāsah Muqāranah* (The Effects of War in Islam: A Comparative Study). His main contribution is support for the defensive nature of jihād.[14]

The other main contribution is the encyclopaedic project on international relations in Islam sponsored and published in Arabic in fourteen volumes in 1996 by the USA-based International Institute of Islamic Thought (IIIT). Unlike other works on the subject, this project is conducted by a group of twenty-seven academic specialists, mostly of Cairo University, who, interestingly, are not traditionally trained in Islamic studies. In addition to defensive war, this project confirms that Muslims may also resort to war if they are prevented from preaching Islam.[15]

The latest contribution to the subject is the two-volume work by the renowned Shaykh Yūsuf al-Qaraḍāwī published in the second half of June 2009 under the title *Fiqh al-Jihād: Dirāsah Muqāranah li-Aḥkāmih wa Falsafatih fī Ḍaw'*

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[12] Muḥammad Abū Zahrah, *Al-ʿAlāqāt al-Dawliyyah fī al-Islām* (Cairo: Al-Dār al-Qawmiyyah lil-Ṭibāʿah wa al-Nashr, 1964/1384), pp. 47-52, 89-94.
[13] Ibid., pp. 19-46.
[14] Wahbah al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām: Dirāsah Muqāranah*, 3rd ed. (Damascus: Dār al-Fikr, 1998/1419), pp. 84, 106-136.
[15] ʿAbd al-ʿAzīz Ṣaqr, *'Al-ʿAlāqāt al-Dawliyyah fī al-Islām Waqt al-Ḥarb: Dirāsah lil-Qawāʿid al-Munaẓẓimah li-Sayr al-Qitāl*, Mashrūʿ al-ʿAlāqāt al-Dawliyyah fī al-Islām 6 (Cairo: Al-Maʿhad al-ʿĀlamī lil-Fikr al-Islāmī, 1996), pp. 7-29.

*al-Qur'ān wa al-Sunnah* (Understanding Jihād: A Comparative Study of its Rules and Philosophy in the Light of the Qur'ān and Sunnah). This work will have a large influence in the future because of the scholarly weight and popularity of the author and its coverage of many issues related to the subject. The author follows the same line of thought as Ibn Taymiyyah and Abū Zahrah on the subject. He adds that at present there are three kinds of jihād: (1) the liberation of occupied Muslim countries; (2) peaceful attempts to change the current Muslim regimes that permit acts that are absolutely prohibited in Islam; and (3) preaching Islam to the rest of the world in their languages via the Internet, radio and satellite channels as well as written publications.[16] Unlike the previously mentioned contributions, al-Qaraḍāwī also treats the important issue of how internal hostilities are dealt with in Islamic law.

Concerning the Western literature, it is quite noticeable that Majid Khadduri's (1909-2007) *War and Peace in the Law of Islam* and his translation of Al-Shaybānī's work under the title *The Islamic Law of Nations: Shaybānī's Siyar*[17] remain the main sources for Western researchers on the subject. His ideas on jihād expressed in the former of these two works and his introduction to the latter have had a decisive influence on the current Western literature, despite the fact that he discusses mainly classical Muslim jurists and historians and even then not in a manner that fairly reflects the diversity of their opinions. It is quite easy sometimes to trace the influence of his ideas, and even his vocabulary, in current Western literature. Whether this influence is acknowledged or not, many writers have accepted without question some of his mistaken ideas and his hostile presentation of

[16] Yūsuf al-Qaraḍāwī, *Fiqh al-Jihād: Dirāsah Muqāranah li-Aḥkāmih wa Falsafatih fī Ḍaw' al-Qur'ān wa al-Sunnah* (Cairo: Maktabah Wahbah, 2009), Vol. 2, pp. 1183-1197.

[17] To give an example of the role which translation of Islamic literature into European languages plays in shaping Western studies of Islam, David A. Westbrook writes "I concentrate on Shaybani because he has been translated into English, and so can be read as a primary source", David A. Westbrook, "Islamic International Law and Public International Law: Separate Expressions of World Order", *Virginia Journal of International Law*, Vol. 33, 1993, p. 828, footnote no. 15.

jihād in particular, and the classical theory of international relations, in general.[18] AbuSulayman and Zawati criticize him for his hostile and stereotyped conclusions on jihād.[19] Zawati also criticises Bernard Lewis for the same sort of scholarship.[20]

The core of Khadduri's understanding of jihād can be found in the following words: "The jihād was therefore employed as an instrument for both the universalization of religion and the establishment of an imperial world state."[21] He adds that "jihād may be regarded as Islam's instrument for carrying out its ultimate objective by turning all people into believers, if not in the prophethood of Muḥammad (as in the case of dhimmis), at least in the belief in God."[22] However, he writes in another work that jihād was the instrument for "achiev[ing] Islam's ultimate objective, namely, the enforcement of God's law (the *Shari'a*) over the entire world."[23] In fact, Khadduri does not explain how and from where he deduced these

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[18] See, for example, Bernard Lewis, "Roots of Muslim Rage", *The Atlantic Monthly*, Vol. 266, No. 3 September 1990, pp. 47-60; Roda Mushkat, "Is War Ever Justifiable? A Comparative Study", *Loyola of Los Angeles International and Comparative Law Journal*, Vol. 9, No. 2, 1987, pp. 302 f.; Abdullahi Ahmed An-Naʿim, "Islamic Law, International Relations, and Human Rights: Challenge and Responses", *Cornel International Law Journal*, Vol. 20, 1987, pp. 317-336; Christopher A. Ford, "Siyar-ization and its Discontents: International Law and Islam's Constitutional Crisis", *Texas International Law Journal*, Vol. 30, 1995, pp. 499-533; Johnson, *The Holy War Idea*, pp. 115-124; David Aron Schwartz, "International Terrorism and Islamic Law", *Columbia Journal of Transnational Law*, Vol. 29, 1991, pp. 629-652; Rachel Saloom, "Is Beheading Permissible Under Islamic Law? Comparing Terrorist Jihad and The Saudi Arabian Death Penalty", *UCLA Journal of International Law and Foreign Affairs*, Vol. 10, 2005, pp. 228, 230; Robert Spencer, "Majid Khadduri and George W. Bush", [article online]; available from http://www.jihadwatch.org/archives/017169.php; Internet; accessed 9 July 2007; Daniel Pipes, "Jihad and the Professors", [article online]; available from http://www.campus-watch.org/article/id/301 Internet; accessed 9 July 2007.

[19] See ʿAbdulḤamid A. AbuSulayman, *Towards an Islamic Theory of International Relations: New Directions for Methodology and Thought*, 2nd & rev. ed. (Herndon, VA: International Institute of Islamic Thought, 1993/1414), pp. 20-24; Hilmi M. Zawati, *Is Jihad a Just War? War, Peace, and Human Rights under Islamic and Public International Law*, Studies in Religion and Society, Vol. 53 (Lewiston, NY: Edwin Mellen Press, 2001), pp. 13, 37, 39, 49 f., 72 f., 75 f., 80 f.

[20] Hilmi M. Zawati, "Just War, Peace and Human Rights under Islamic and International Law" (MA Thesis, McGill University, 1997), pp. 1 f.; Zawati, *Is Jihad a Just War?*, pp. 13, 15 f., 112.

[21] Majid Khadduri, *War and Peace in the Law of Islam* (Baltimore, MD.: Johns Hopkins University Press, 1955), p. 51.

[22] Ibid., p. 64.

[23] Majid Khadduri, "Islam and the Modern Law of Nations", *American Journal of International Law*, Vol. 50, No. 2, Apr. 1956, p. 359. In his PhD thesis, Mohamed Mokbel Mahmud Elbakry also argues that jihād is the instrument of Islam for carrying out its ultimate objective of the application of the sharīʿah. See Mohamed Mokbel Mahmud Elbakry, "The Legality of 'War' in Al-Shariʿa Al-Islamiya

various interpretations of jihād. He seems sometimes to be mainly trying to give an interpretation for the objectives of what he calls “the expanding Muslim state” during the first century of the Islamic era rather than interpreting the jurists’ understandings of jihād. In other words, he sometimes confuses Muslim history with Islamic law and unfortunately does not adequately refer to the classical Islamic law books of the various schools. Perhaps the wide acceptance of his understanding of jihād in Western literature relates partly to the way he reduces such complex subject to such simple ideas.

Rudolph Peters, the Dutch expert in the field, disagrees with the earlier Western literature on the objective of jihād and argues that its aim was “the expansion – and also defence – of the Islamic state.”[24] Unlike Khadduri, Peters discusses extensively both the classical and modern Muslim literature on jihād and his study of the subject makes his work more reliable.[25] However, his study of jihād focus on international armed conflicts and thus does not treat domestic jihād.

Reuven Firestone’s *Jihād: The Origin of Holy War in Islam* attempts to study what he calls “the origins of the concept and application of warring that we now define as ‘holy war’ in the earliest period of Islamic history.”[26] In fact, studying the earliest occurrences of fighting between the Muslims and their enemies during the Prophet’s lifetime is essential for understanding the nature of the Islamic law of war,

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(The Islamic Law) and Contemporary International Law: Comparative Study” (PhD thesis, University of Glasgow, 1987), pp. 230, 232, 259, 613-616.

[24] Rudolph Peters, trans. and ed., *Jihad in Mediaeval and Modern Islam: The Chapter on Jihad from Averroes’ Legal Handbook ‘Bidayat Al-Mudjtahid’ and The Treatise ‘Koran and Fighting’ by The Late Shaykh Al-Azhar, Mahmud Shaltūt* (Leiden: Brill, 1977), p. 3. See also Rudolph Peters, *Islam and Colonialism: The Doctrine of Jihad in Modern History* (The Hague: Mouton, 1979); Rudolph Peters, “Djihad: War of Aggression or Defense?”, in Albert Dietrich, ed., *Akten des VII. Kongresses Für Arabistik und Islamwissenschaft* (Göttingen, Aug. 1974) (Göttingen: Vandenhoeck & Ruprecht, 1976), pp. 282-289.

[25] This study disagrees with Peters’ opinion that Majid Khadduri’s *War and Peace in the Law of Islam* is “A reliable survey of the classical doctrine of jihad.” See Rudolph Peters, *Jihad in Classical and Modern Islam* (Princeton: Markus Wiener, 1996), p. 197.

[26] Firestone, *Jihād*, p. 5.

a task Firestone's book, though promised above, did not achieve. Based on his brief reading of the battle of Badr (Ramaḍān 2/March 624), the first battle in Islam, he admits: "Because we have reached the point after Badr where, according to the tradition, warring in the path of God was now required virtually without restriction, the material following Badr will not occupy us."[27] However, had Firestone studied the occurrences of war in the period his book promises to study and found out who was the offensive and defensive party and what were the reasons for such incidents, the whole thesis of his book may have been different. He assumes that, because Badr is considered a war in the path of God, jihād in the period studied in his book automatically means "holy war". In fact, a justification for war couched in religious terms does not necessarily make it a holy war. In any case an investigation needed to decide, among other things, whether such a war is offensive or defensive. His own reading led him to the conclusion that the incidents of war were initiated by the Muslims and were initially "materialistic raids" which were transformed into holy war or what he calls "total declaration of war against all groups, whether kin or not, who did not accept the truth of the hegemony of Islam."[28]

John Kelsay and James Turner Johnson approach the subject from a comparative perspective between Western and Islamic traditions. Although this approach is very helpful to researchers concerned about the similarities and dissimilarities between the Christian/Western and Islamic traditions, their dependence on secondary sources, mainly works in English in the case of Islam, has limited their conclusions and therefore their contribution to the subject. The influence of Khadduri's works surfaces in their writings particularly in case of international armed conflicts, while Khaled Abou El Fadl's influence emerges with

[27] Ibid., p. 114.
[28] Ibid., p. 134.

regard to domestic armed conflicts, namely, in cases of armed rebellion. The aims of jihād, according to Kelsay, are “extending Islamic hegemony… [and] defending an established Islamic polity”.[29] Had Kelsay and Johnson studied the primary sources in Islamic languages, their contributions to the subject would have been much greater.

A number of laudable contributions are made by Abou El Fadl, Sherman A. Jackson and Sohail H. Hashmi. Because of their training and knowledge of Islamic languages, they fulfil the rarely met need for scholars who are experts in both Western and Islamic scholarship in the subject. Abou El Fadl’s exhaustive study *Rebellion and Violence in Islamic Law* is the most in-depth treatment of its subject and thus provides a pioneering investigation of this kind of domestic war, i.e., armed rebellion. Jackson’s “Domestic Terrorism in the Islamic Legal Tradition” is the best treatment of its subject, while his “Jihad and the Modern World” is also a laudable contribution to the study of the classical and modern Islamic *jus ad bellum*. Jackson insightfully concludes “that a prevailing ‘state of war,’ rather than difference of religion, was the *raison d'être* of jihad and that this ‘state of war’ has given way in modern times to a global ‘state of peace’ that rejects the unwarranted violation of the territorial sovereignty of all nations.”[30] Hashmi’s “Saving and Taking Life in War: Three Modern Muslim Views” and “Islamic Ethics and Weapons of Mass Destruction: An Argument for Nonproliferation” provide insightful analysis into some aspects of Islamic international humanitarian law.

This brief survey of both insider and outsider literatures shows that each of the above works has its own approach to and focus on certain aspects of the study of the Islamic law of war. This study therefore attempts, as follows, to study the

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[29] John Kelsay, *Islam and War: A Study in Comparative Ethics* (Louisville, KY: Westminster/John Knox, 1993), p. 53.
[30] Sherman A. Jackson, “Jihad and the Modern World”, *Journal of Islamic Law and Culture*, Vol. 7, No. 1, 2002, p. 25.

justifications and regulations for the use of force in both international and domestic armed conflicts in the insider and outsider literatures.

## 6. Methodology

This study is a library-based research and the material studied here is mainly books, articles and in some cases online material. The study utilizes an insider/outsider approach. The insider approach refers to what Muslims advocate about their specific understandings of the issues in question. The outsider approach in this study refers to the understandings of these issues in the Western literature that has been consulted. The terms Islamic/insider and Western/outsider literatures refer specifically to the works discussed in this study. Thus, the insider/outsider approach adopted in this study is simply a comparative method that aims at tracing and analysing when, how and why these two literatures agree or disagree on the same issues in question.

Indeed, this study argues the necessity of utilizing an insider approach when it comes to the study of religion and history of others, or in comparative studies, but only *as a first step* to fairly present and understand what is maintained by the insiders. Put differently, researchers should refer to the original sources, i.e., the insiders, to find out how the issues in question are described by the insiders rather than depending on secondary resources, i.e., the outsider, in the description of such issues. This does not mean that the conclusions of the insiders should be adopted, but rather that a fair, objective presentation of the insiders must be given on the basis of how they themselves maintain and advocate their own beliefs and views. This methodology also applies to different sects within the same religion, or different ethnicities, or any rival within the same entity. Then, only after this initial step, scholars can start objective studies and develop their own conclusions. If this process

is not followed, outsider scholars may slip into producing theories and conclusions which are later developed into widely circulated so-called facts in outsider literature that are simply based on misrepresentation, with the insider literature ignored. With the passage of time, two different readings of an "other" are created which may often be described as negative/outsider and positive/insider.

Therefore, objectivity remains a relative term that changes according to who and which literature (insider or outsider) is dealing with the issues in question. This is because researchers are influenced by their own religious, historical, cultural and personal experiences, which inevitably dictate how they analyse, study[31] and judge others. W. Montgomery Watt (d. 2006) writes:

> Normally a person can only reach important levels of religious experience through participating in the life of the community in which he has been brought up and basing his activity on its ideas. There are exceptions, but this is the normal case. It is not easy for a person brought up in a Christian environment to appreciate the religious ideas of Islam, far less to make them the basis of a satisfactory life. The same is true for the Muslim with Christian ideas. This means that it is Christian ideas which give the Christian the best chance of attaining a richer and deeper experience, and likewise Muslim ideas the Muslim.[32]

In fact, Watt's observation here about the appreciation of the ideas of religions different from one's own also applies to any other set of ideas, whether political, social or otherwise, because human beings generally become products of certain ideas and thus tend to work, analyse and judge others accordingly.

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[31] See Jabal Muhammad Buaben, *Image of the Prophet Muḥammad in the West: A Study of Muir, Margoliouth and Watt* (Leicester: Islamic Foundation, 1996/1417), pp. 327, 329.

[32] W. Montgomery Watt, *Bell's Introduction to the Qur'ān*, Islamic Surveys 8 (Edinburgh: Edinburgh University Press, reprint 1997), p. 182.

All translations of the Qur'ānic texts and Ḥadīths are mine. An important note concerning transliteration: all Arabic words are transliterated according to their pausal forms. The point here is to help the non-Arabic speaking reader to know how the Arabic word is written. The conversion of Islamic dates to the Christian calendars follows G.S.P. Freeman-Grenville's *The Muslim and Christian Calendars*.[33]

**7. Structure of the Study**

This study consists of an introduction, five chapters and a conclusion. The first four chapters treat international wars, while Chapter Five treats internal hostilities and terrorism in Islamic law. The study examines the Islamic justifications for war against non-Muslims, i.e., international war according to the classical Islamic state system, in the first three chapters. Chapter One studies the *Sīrah* literature to find out the justifications for the incidents of fighting between the Muslims and their enemies during the Prophet's lifetime. Chapter Two studies the interpretations of the Qur'ānic justifications for war in some of the most influential classical and modern Qur'ān *Tafsīr* (exegeses) literature. Chapter Three studies the justifications for war and Islamic attitudes towards non-Muslims in the classical Islamic juridical theory of international law and modern Islamic writings on the subject.

This specific order of these three chapters is very important because, first, the Qur'ānic texts on war address specific contexts so determining the contexts which these Qur'ānic texts address is essential before commencing any study of the Qur'ānic position on the subject, and, second, because it was on the basis of the incidents of fighting between the Muslims and their enemies (discussed in Chapter

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[33] G.S.P. Freeman-Grenville, *The Muslim and Christian Calendars: Being Tables for the Conversion of Muslim and Christian Dates from the Hijra to the Year A.D. 2000,* 2nd ed. (London: Rex Collings Ltd, 1977). An easier way for date conversion from Islamic to Christian dates and vice versa is available from http://www.islamicfinder.org/dateConversion.php and http://www.islamonline.net/calculator/english/hijrigregoriancalculator.asp.

One), and the interpretations of the Qur'ānic texts addressing these incidents (discussed in Chapter Two) that Muslim jurists developed the Islamic law of war. Chapter Four discusses the regulations governing war in international armed conflicts under Islamic law and completes the treatment of international armed conflicts in this study.

Chapter Five is devoted to internal armed conflicts and terrorism in Islamic law. It studies the justifications and regulations for the use of force in internal armed conflicts. In particular, it discusses in some detail the law of fighting against *al-bughāh* (rebels, secessionists) and the law of fighting against *al-muḥāribūn*/*quṭṭāʿ al-ṭarīq* (bandits, highway robbers, pirates). Following the discussions of these two kinds of internal armed conflicts and, before that, the use of force in international armed conflicts, Chapter Five discusses the claim that the concept of jihād is the cause of acts of terrorism perpetrated by Muslims and addresses the questions of the treatment and punishment of terrorism under Islamic law. Chapter Five is longer than the other chapters, but this is necessary in order to cover the arguments regarding the treatment of terrorism and the punishment of terrorists under Islamic law, which are dealt with in the same chapter, following the consideration of the kinds of internal hostilities referred to above.

# CHAPTER ONE

# WAR DURING THE PROPHET’S LIFETIME

## 1.1 Introduction

Studies of war are greatly affected by whether the researchers concerned are insiders or outsiders. In cases when the participants in a war are followers of a particular religion or religions, researchers may be affected by their religious, historical, cultural or intellectual view of the religions concerned, even if they themselves do not belong to any of the parties to the conflict. This sometimes affects their degree of objectivity in deciding what is justified and what is not, as well as what might count as defensive and what might not. In the case of holy war, if it is agreed that holy war is fighting in the name of religion or fighting for religion, one of the questions to be raised is whether holy war includes fighting in self-defence against armed aggression or against the persecution of a particular religious group. This chapter uses the term “holy war” in the sense of an armed conflict between members of different religions, waged to propagate the combatants’ religion.

The study of the tradition of war in Islam must start by investigating relations between the earliest Muslims and their communities, including how non-Muslims reacted to the emergence of the religion of Islam and, more importantly, the occasions when fighting took place between the Muslims and their enemies during this period, i.e., during the lifetime of the Prophet. The significance of starting with the occurrences of fighting during this period is that it is on the basis of these incidents and the Qur’ānic texts addressing them that the classical Muslim jurists developed the Islamic law of war. Therefore, this chapter examines the wars that took place during the Prophet’s lifetime – specifically after the Prophet received the message of Islam – and which are referred to in the early *Sīrah* (biographies of the

Prophet) literature, with the goal of discovering the reasons and justifications for these wars, as well as their aims. It attempts to interpret these incidents in their historical, cultural and geographical context in order to offer an explanation of their aims and justifications and their nature. This analysis leads to an understanding of how far these conflicts correspond to the concept of “holy war” as defined above and, more importantly, to a definition of the nature and meaning of jihād in this period, i.e., the lifetime of the Prophet. It will therefore necessarily relate to the history, culture, religion, economy, language and even geography of those involved in the wars concerned. In particular, this chapter argues that studying the first thirteen years in the history of Islam, known as the Meccan period, is essential for understanding the nature of the conflict between the Muslims and their enemies in the later period known as the Medinan period.

### 1.2 Problems in the Study of *Sīrah*

The early biographers of the Prophet basically collected the available reports about the period of his life. The reliability of the biographers is judged on the basis of their scrutiny of the sources and on the completeness of the *isnād* (chain of narrators) for each report they collected, which would ideally go back to a narrator who witnessed the events. Many Western scholars doubt the reliability of the early biographies of the Prophet and some recognize only the Qur’ān as a reliable source of knowledge for the early period of Islam. This amounts to a rejection of authentic sources on the life of the Prophet, as W. Montgomery Watt (d. 2006) remarks, and the theories based on these sources. Watt, like Muslim scholars, recognizes the reliability of the

early biographical material, unless there are specific reasons why particular parts should be discredited.[1]

The majority of Muslim scholars give much credence to the biography by Ibn Isḥāq (d. 150/767-8).[2] His biography, edited by Ibn Hishām (d. 218/833), is one of the main sources for an account of the life of the Prophet. However, Ibn Isḥāq's authority as a jurist writing on legal issues is discredited by Aḥmad ibn Ḥanbal (d. 241/855).[3] Western scholars often rely on the work on the early period of Islam by al-Wāqidī (d. 207/822-3), entitled *Kitāb al-Maghāzī*.[4] However, al-Wāqidī's authority is discredited by many Muslim scholars and he is even denounced as "*kadhdhāb*"[5] (a liar) by Ibn Ḥanbal. However, his *Al-Maghāzī* is the main source used by Western scholarship with regard to the incidents of war in the period covered in this chapter. It is worth mentioning here that early Muslim scholars did not scrutinize reports on matters related to the biography of the Prophet and early Islamic history as much as they did reports on matters related to theology and jurisprudence.

Biographers generally refer to the incidents of fighting between Muslims and their enemies during the Prophet's lifetime as *al-ghazawāt* or *al-sarāyā*. *Ghazawāt*, (sing. *ghazwah*), which has the same meaning as *maghāzī*,[6] means raids. Here it refers to any of the missionary and military campaigns, and in fact other trips, in

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[1] See W. Montgomery Watt, *Muhammad at Medina* (Karachi: Oxford University Press, 1981), pp. 336-338; W. Montgomery Watt, *Muḥammad: Prophet and Statesman* (Oxford: Oxford University Press, 1961), pp. 241 f.

[2] Muḥammad ibn Isḥāq, *Al-Sīrah al-Nabawiyyah*, ed. ʿAbd al-Malik ibn Hishām, annotated by Fu'ād ibn ʿAlī Ḥāfiẓ (Beirut: Dār al-Kutub al-ʿIlmiyyah, 2000).

[3] See Ismāʿīl ibn ʿUmar ibn Kathīr, *Al-Sīrah al-Nabawiyyah* (Beirut: Dār al-Kitāb al-ʿArabī, 1997), Vol. 1, p. 24.

[4] Muḥammad ibn ʿUmar al-Wāqidī, *Kitāb al-Maghāzī*, ed. Muḥammad ʿAbd al-Qādir ʿAṭā (Beirut: Dār al-Kutub al-ʿIlmiyyah, 2004/1424).

[5] M. Hinds, "Maghāzī", *Encyclopaedia of Islam*, New ed., Vol. V, p. 1163. According to al-Ghunaimi, al-Wāqidī is considered one of "the most famous four, among the many, fabricators of ḥadīth", see Muḥammad Ṭalaat al-Ghunaimi, *Qānūn al-Salām fī al-Islām* (Alexandria, Egypt: Munsha'ah al-Maʿārif, 2007), p. 150.

[6] According to Lane, *maghāzī* means "The memorable deeds of… those who engage in warring, or warring and plundering, expeditions", see Edward William Lane, *An Arabic-English Lexicon* (Beirut: Librairie Du Liban, 1968), Vol. 6, p. 2257.

which the Prophet took part. *Sarāyā* (sing. *sariyah*) refers to expeditions allegedly sent by the Prophet but in which, unlike the *ghazawāt*, he did not take part.[7]

Martin Hinds remarks that the purpose of the study of *maghāzī* from the second half of the second/eighth century onwards requires further research.[8] A meticulous study of this issue in the biographies of Ibn Isḥāq, al-Wāqidī, Ibn Saʿd (d. 230/845) and al-Dhahabī (d. 748/1348) reveals that the aim of the biographers was to record all the accounts relevant to the life or the person of the Prophet. They merely aimed at transferring tens of thousands of reports and organizing them chronologically according to topic. They give different chronologies and in some cases details that could lead to different conclusions on the reasons for and objectives of some of these *ghazawāt* and *sarāyā*. They did not attempt to examine the various reports in order to inform the reader of what they considered to be the reasons or justifications for these incidents.

This attitude seems to be the result of the biographers' desire to avoid taking responsibility for adopting a particular account when conflicting reports existed. Adopting specific accounts would mean discrediting the authenticity of other reporters and their accounts. This job was left to another category of Islamic scholars, i.e., the *muḥaddithūn* (specialists in Ḥadīth), who invented a number of disciplines to evaluate the authenticity of reports. By simply recounting the various reports, the biographers put the responsibility on the shoulders of the narrators and it is left to the readers to decide about such incidents. Although this attitude is in some cases troubling and perplexing to the researchers who want to answer particular

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[7] Muḥammad Sayyid Ṭanṭāwī, *Al-Sarāyā al-Ḥarbiyyah fī al-ʿAhd al-Nabawī* (Cairo: Al-Zahrā' lil-Iʿlām al-ʿArabī, 1990/1410), p. 21; Ḥusayn Mujīb al-Maṣrī, *Ghazawat al-Rasūl Bayn Shuʿarā' al-Shuʿūb al-Islāmiyyah: Dirasah fī al-Adab al-Islāmī al-Muqāran* (Cairo: Al-Dār al-Thaqāfiyyah lil-Nashr, 2000/1420), pp. 32 f.; Youssef H. Aboul-Enein and Sherifa Zuhur, "Islamic Rulings on Warfare", [article online]; available from http://www.strategicstudiesinstitute.army.mil/pubs/display.cfm?pubID=588; Internet; accessed 21 April 2009, p. 6.

[8] Hinds, "Maghāzī", p. 1162.

questions about justifications for war in the period studied here, it prevents any biographer's personal inclination from influencing the acceptance of a particular version.

This means that contemporary researchers need to struggle through these thousands of reports to find out the justifications for going to war in this period. Furthermore, they sometimes even need to reconstruct the situation and find out which party to a conflict initiated the aggression. In the light of the diverse answers to these questions, various theories on the tradition of war in Islam have been formulated, as will be shown below. This explains the controversy among Muslims and non-Muslims alike about the Islamic justifications for war, as will be explained below. Inevitably, discrepancies appear in the *Sīrah* literature simply because earlier reporters were recounting only the part of the incident they witnessed or knew about. Moreover, a painstaking study of the *ghazawāt* and *sarāyā* reveals that the intention of the reporters, as well as the biographers, was not to address the incidents they were reporting or writing about for their own sake, but rather to record the life, character and example of the Prophet. Hence, slight differences exist in the presentation of some incidents as a result of the different perceptions or evaluations of the reporters or biographers. These differences have been kept to a minimum because the biographers have confined themselves throughout history to simply reporting the events. This explains the omission of any statement about the reasons for and objectives of some *ghazawāt* and *sarāyā* and the writers' satisfaction with merely describing the incidents. It is worth mentioning here that differing reasons for and accounts of the same incident are sometimes found.

**1.3 The Meccan Period**

One of the few books that studies the "origins" of the concept of jihād in the period studied here is Reuven Firestone's *Jihād: The Origin of Holy War in Islam*. In his reading of the Meccan period, Firestone constructs a particular version in order to support his theory on war in Islam. He portrays the Muslims as determined to initiate aggression towards the Meccan idolaters, claiming that the Meccans "did not oppose him [the Prophet] until he began berating their gods and insulting their ancestors who died as unbelievers."[9] Moreover, he proposes that it was the Prophet, not the Meccans, who initiated the battles.[10]

As for the sources, he states that all the available literature is written by "the winning Muslims, whose very success was predicted by their willingness (or desire) to engage actively in war."[11] Moreover, he confirms that some of the *Sīrah* was "forged" in order to fill the gaps in the Prophet's life, to extol his miracles, or to give an appropriate context for particular Qur'ānic verses.[12] However, he also claims that Qur'ānic verses were provided to sanction a particular historical account.[13]

An examination of the sources Firestone uses gives exactly the opposite reading. It is interesting to note that these sources explain that the Prophet refrained from preaching the call for three years out of fear of the reaction of the Meccans, until he received the Qur'ānic revelations (15:94; 26:214-215) that commanded him to declare the message he received.[14] In one incident, Abū Bakr is reported to have saved the Prophet from a group of men who encircled him; when he saw that one of

[9] Reuven Firestone, *Jihād: The Origin of Holy War in Islam* (New York: Oxford University Press, 1999), p. 106.
[10] Ibid., p. 110.
[11] Ibid., p. 107.
[12] Ibid., p. 105.
[13] Ibid., p. 131.
[14] Ibn Isḥāq, *Al-Sīrah*, Vol. 1, p. 190; A. Guillaume, trans. *The Life of Muhammad: A Translation of Isḥāq's Sīrat Rasūl Allāh* (Oxford: Oxford University Press, 1955), p. 117.

them had seized the Prophet's robe, he "interposed himself weeping and saying, 'would you kill a man for saying Allah is my Lord?'".[15]

*Sīrah* literature describes the kinds of torture to which *al-mustaḍʿafīn* (oppressed, socially weak Muslims) were subjected.[16] Bilāl, a slave who performed the call to prayer, is described as having been severely tortured by his master to force him to abandon the new religion and worship the famous Quraysh idols al-Lāt and al-ʿUzzā. Bilāl is reported as saying during his torture "*aḥad aḥad*" ("One, One", meaning that there is only one God).[17] The whole family of Yāsir, including ʿAmmār ibn Yāsir, his father and his mother Sumayyah the daughter of al-Khayyāṭ, are also reported to have been brutally tortured. The Prophet passed by them as they were being tortured and, being unable to save them, he said, "*Ṣabrā āl Yāsir! Mawʿidukum al-jannah*"[18] ("Patience, O family of Yāsir! Your meeting-place will be paradise").[19] The mother, Sumayyah, known as the first female martyr in Islam, and her husband, Yāsir, were killed under torture because of their adamant refusal to abandon the religion of Islam.[20] It is worth mentioning here that these two phrases are very present in the Muslim mind and Muslims still use them. For example, they say "*Ṣabrā āl Yāsir! Mawʿidukum al-jannah*" in situations when asking someone to be patient and to bear the injustice or difficulties of a situation in order to achieve something desirable.

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[15] Ibn Isḥāq, *Al-Sīrah*, Vol. 1, p. 211; Guillaume, *The Life of Muhammad*, p. 131.
[16] Sohail H. Hashmi, "Islam, Sunni", *Encyclopedia of Religion and War*, ed., Gabriel Palmer-Fernandez (New York: Routledge, 2004), p. 217. On the religious persecution and torture of the Muslims during the Meccan period see, Nādiyah Ḥusnī Ṣaqr, *Falsafah al-Ḥarb fī al-Islām* (Cairo: Supreme Council for Islamic Affairs, 1990/1410), pp. 9-21.
[17] Ibn Isḥāq, *Al-Sīrah*, Vol. 1, pp. 233 f.; Guillaume, *The Life of Muhammad*, p. 144.
[18] Ibn Isḥāq, *Al-Sīrah*, Vol. 1, p. 235; Muḥammad Rashīd Riḍā, *Tafsīr al-Qur'ān al-Ḥakīm: Al-Shahīr bi-Tafsīr al-Manār* (Cairo: Dār al-Manār, 1931-2/1350), Vol. 2, pp. 316 f.
[19] Guillaume, *The Life of Muhammad*, p. 145.
[20] Adil Salahi, *Muhammad Man and Prophet: A Complete Study of the Life of the Prophet of Islam* (Leicestershire: Islamic Foundation, 2002/1423), p. 132; Riḍā, *Tafsīr al-Manār*, Vol. 2, p. 317; ʿAbd al-Munʿim al-Ḥifnī, *Mawsūʿah al-Qur'ān al-ʿAẓīm* (Cairo: Maktabah Madbūlī, 2004), Vol. 2, p. 1910.

Abū Jahl (d. 2/624), the influential Qurayshite leader,[21] had various ways of fighting Islam. Whenever he discovered that a noble and well-connected person had embraced the new religion, he reprimanded, scorned and threatened to defame that person. When a merchant embraced Islam, Abū Jahl threatened to boycott and destroy his business. He also beat weak Muslims and incited others against them.[22] Some Meccan idolaters were even determined to kill those who embraced Islam. For example, a group of men from al-Makhzūm clan agreed to kill some new converts to Islam, including al-Walīd ibn al-Walīd ibn al-Mughīrah. Being afraid of his violent temper, they could not tell Hishām ibn al-Walīd that they wanted to kill his brother. They told him that they sought to convince his brother to forsake the religion of Islam. Hishām agreed that they could admonish his brother but warned them that if they killed him, he would kill the noblest man among them. For this situation, Hishām recited the following verse, translated by A. Guillaume as:

"My brother ʿUyays shall not be killed,

Otherwise there will be war between us forever"[23]

The Meccan idolaters' systematic collective torture of anyone who followed Islam is described as follows: "every clan which contained Muslims attacked them [the Muslims], imprisoning them, and beating them, allowing them no food or drink, and exposing them to the burning heat of Mecca, so as to seduce them from their religion. Some gave way under pressure of persecution, and others resisted them, being protected by God."[24] Under all these kinds of torture and the threat of murder, some Muslims were forced to abandon the religion of Islam and to declare that their gods

[21] See W. Montgomery Watt, *Muhammad at Mecca* (Oxford: Clarendon Press, reprint 1968), p. 134; W. Montgomery Watt, "Abū D̲jahl", *Encyclopaedia of Islam*, New ed., Vol. I, p. 115.
[22] Ibn Isḥāq, *Al-Sīrah*, Vol. 1, p. 236; Guillaume, *The Life of Muhammad*, p. 145. See also Bruce B. Lawrence, *The Qur'ān: A Biography* (London: Atlantic Books, 2006), p. 41.
[23] Guillaume, *The Life of Muhammad*, p. 145; Ibn Isḥāq, *Al-Sīrah*, Vol. 1, pp. 236 f. Where direct quotations are taken from Guillaume's translation, his translation is given in the references before Ibn Isḥāq's original text.
[24] Guillaume, *The Life of Muhammad*, p. 143; Ibn Isḥāq, *Al-Sīrah*, Vol. 1, p. 233.

were the idols al-Lāt and al-ʿUzzā, and not God.[25] The Qur'ān (16:106) addressed this by affirming that such cases of apostasy under torture are excusable.

Facing all these tortures and persecution and with no hope of stopping this aggression, the Prophet asked some Muslims to flee to Abyssinia because its king, the Negus, was a righteous man who would not allow anyone to be oppressed in his territory. Thus, "being afraid of apostasy and fleeing to God with their religion",[26] about eighty-three Muslims fled to Abyssinia, and can thus be described as the first asylum seekers in the history of Islam. This is known as the first *hijrah* (flight) in Islam. In fact, the Meccan idolaters were determined to get the emigrants back and sent ʿAbd Allah ibn Abū Rabīʿah and ʿAmr ibn al-ʿĀs ibn Wā'il, described as two determined men, with presents to the Negus in order to bring them back to Mecca. The justification these two men gave to the Negus was that the emigrants were a group of people who rejected idol-worship and did not accept his religion, i.e., Christianity but had invented a new religion, i.e., Islam. After the Negus heard from the emigrants, he refused to give them back and promised to continue to protect them.[27]

The number of those who accepted Islam increased inside and outside Mecca, so the Quraysh decided to boycott the clans of Banū Hāshim and Banū al-Muṭṭalib. They issued a document and hung it up on the Kaʿbah to the effect that members of the Quraysh should not inter-marry with these two clans, or sell to them or buy from them.[28] Persecution of the Prophet and the Muslims increased after the death of both the Prophet's protector, his uncle Abū Ṭalib, and the Prophet's wife Khadījah in

[25] Ibn Isḥāq, *Al-Sīrah*, Vol. 1, p. 236; Guillaume, *The Life of Muhammad*, p. 145.
[26] Guillaume, *The Life of Muhammad*, p. 146; Ibn Isḥāq, *Al-Sīrah*, Vol. 1, p. 237.
[27] Ibn Isḥāq, *Al-Sīrah*, Vol. 1, pp. 247-251; Guillaume, *The Life of Muhammad*, pp. 150-153; Muḥammad Ḥusayn Haykal, *The Life of Muḥammad*, trans. from the 8th ed. by Ismaʿīl Rāgī A. al-Fārūqī (n.p.: North American Trust Publication, 1976), pp. 98-100; ʿAbd al-Ḥalīm Maḥmūd, *Al-Jihād fī al-Islām*, 2nd ed. (Cairo: Dār al-Maʿārif, 1988), pp. 6-8.
[28] Ibn Isḥāq, *Al-Sīrah*, Vol. 1, p. 260; Guillaume, *The Life of Muhammad*, pp. 159-161.

619.[29] The Prophet continued preaching Islam to the neighbouring tribes and those who came to the fairs at Mecca, calling them to God and asking them for their protection. Many rejected his call to Islam and humiliated him, but others believed and agreed to protect the Prophet from any aggression.[30]

Support for Islam at this time came from *al-Anṣār* (lit. the helpers or supporters), the name given to the new Muslims from Yathrib (Medina), who hosted the Muslims from Mecca and the Prophet after they fled there (the second *hijrah*). Several new Muslim delegations also pledged to support Islam and to protect the Prophet and the Muslims.[31] Thereupon, after finding a second secure place, the Prophet commanded the Muslims in Mecca to flee to Yathrib. They all did so with the exception of ʿAlī ibn Abī Ṭālib (d. 40/ 661) and Abū Bakr (d. 13/634) and those who had been imprisoned or forced to apostatize.[32]

When the Meccan idolaters recognized that Islam had started to gain protectors outside Mecca, they assembled in order to stamp out the new religion and put an end to the issue. After listening to some suggestions on how to get rid of the Prophet, they unanimously agreed "that each clan should provide a young, powerful, well-born, aristocratic warrior; that each of these should be provided with a sharp sword; then each of them should strike a blow at him [the Prophet] and kill him."[33] This plot appealed to all the conspirators because the Prophet's clan would not be able to seek revenge from all of these warriors' clans. While the warriors were waiting by the Prophet's door to assassinate him during his sleep, the Prophet

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[29] Ibn Isḥāq, *Al-Sīrah*, Vol. 2, pp. 14 f.; Guillaume, *The Life of Muhammad*, pp. 191 f.; Muḥammad ibn Muḥammad ibn Muḥammad ibn Sayyid al-Nās, *'Uyūn al-Athar fī Funūn al-Maghāzī wa al-Shamā'il wa al-Siyar*, ed. Muḥammad al-ʿĪd al-Khaṭrāwī and Muḥyī al-Dīn Mito (Medina: Maktabah Dār al-Turāth; Damascus; Beirut: Dār ibn Kathīr, n.d.), Vol. 1, pp. 226-231; Watt, *Muhammad at Mecca*, p. 137; Firestone, *Jihād*, p. 109.

[30] Ibn Isḥāq, *Al-Sīrah*, Vol. 2, pp. 17-30; Guillaume, *The Life of Muhammad*, pp. 192-199; Watt, *Muhammad at Mecca*, pp. 140 f.

[31] Ibn Isḥāq, *Al-Sīrah*, Vol. 2, pp. 24-53; Guillaume, *The Life of Muhammad*, pp. 197-213.

[32] Ibn Isḥāq, *Al-Sīrah*, Vol. 2, p. 64; Guillaume, *The Life of Muhammad*, p. 221.

[33] Guillaume, *The Life of Muhammad*, p. 222; Ibn Isḥāq, *Al-Sīrah*, Vol. 2, pp. 64-65.

survived the plot by miraculously passing through the warriors without their being able to see him.[34] Then the Prophet received a divine command to flee to Yathrib. He ordered ʿAlī ibn Abī Ṭālib to stay in Mecca for three days to return all the valuable properties and goods the people at Mecca had deposited with the Prophet because of his honesty[35] and then, accompanied by his companion Abū Bakr, he left by the back door of the latter's house and hid for three days in Thawr cave, on a mountain below Mecca. Their plot having been foiled, the Meccans offered a reward of one hundred female-camels for the return of the Prophet.

Studying this period indicates, on the one hand, that the Meccan idolaters initiated a state of war against the followers of the new religion. In the words of Watt, the influential "Abū Jahl was bent on crushing the new religious movement."[36] One of the reasons for their aggression towards the Muslims was religious, because the Muslims had abandoned idolatry, the religion of the leaders of the Quraysh and their ancestors, so, in a sense, this state of aggression could be described as a holy war against the Muslims. Moreover, they saw in this new monotheistic religion a profound challenge to their religious, economic and political power[37] because Islam's call to the worship of God necessitated the destruction of their businesses, which depended on the revenues from the pilgrims' visits to the shrines, and this in turn would lead to the destruction of the honour in which the Meccans were held among the Arab tribes. According to T. W. Arnold (d. 1930), the spread of the new religion meant for the Meccans "the destruction of the national religion and the

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[34] Ibn Isḥāq, *Al-Sīrah*, Vol. 2, pp. 66-68; Guillaume, *The Life of Muhammad*, pp. 222 f. See Qur'ān (8:30; 36:1-9).
[35] Ibn Ishạq, Vol. 2, p. 69; Guillaume, *The Life of Muhammad*, p. 224.
[36] Watt, *Muḥammad: Prophet and Statesman*, p. 74.
[37] Watt, *Muhammad at Mecca*, pp. 134-136.; John L. Esposito, *Unholy War: Terror in the Name of Islam* (Oxford: Oxford University Press, 2002), pp. 29 f.

national worship, and a loss of wealth and power to the guardians of the sacred Kaʿbah".[38]

On the other hand, there are many examples of how determined the Prophet and the Muslims were to live by their own beliefs: for example, Bilāl's "*aḥad aḥad*", Abū Bakr's plea to the Meccan idolaters to stop their assault on the Prophet: "would you kill a man for saying Allah is my Lord?", Sumayyah's murder because of her refusal to abandon Islam and worship the idols of the Quraysh and the first and second flights, when Muslims were forced to leave behind their houses, businesses and properties. This determination to live by Islam is clearly expressed in a poem written by ʿAbd Allah ibn al-Ḥārith during his flight to Abyssinia in which he celebrates that the Muslim emigrants were safely settled and able to worship God without fear.[39]

The importance of the Meccan period in the study of the tradition of war in Islam has not been given adequate attention in Western scholarship. Although no fighting took place in this period, in fact, a state of war already existed, and the enmity escalated, especially after the Muslims and the Prophet were forced to leave Mecca, with the consequent confiscation of their land and properties by the Meccans.[40] The failure of Western scholarship to recognize that the *hijrah* signifies a state of war seems to be the result of a cultural misunderstanding. According to Watt, who appears to be influenced in this idea by the Dutch Orientalist Snouck Hurgronje

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[38] T.W. Arnold, *The Preaching of Islam: A History of the Propagation of the Muslim Faith*, 2nd ed. rev. & enl. (London: Constable & Company, 1913), p. 14. See also Watt, *Muhammad at Mecca*, pp. 134-136; M.J. Akbar, *The Shade of Swords: Jihad and the Conflict between Islam and Christianity* (London: Routledge, 2002), p. 1; David Dakake, "The Myth of a Militant Islam", in Aftab Ahmad Malik, ed., *The State We Are in: Identity, Terror and the Law of Jihad* (Bristol: Amal Press, 2006), p. 60.

[39] Ibn Isḥāq, *Al-Sīrah*, Vol. 1, pp. 245-247; Guillaume, *The Life of Muhammad*, pp. 148-150.

[40] See Muḥammad Ḥammīdullāh, *The Battlefields of the Prophet Muhammad, with Maps, Illustrations and Sketches: A Continuation to Muslim Military History* (New Delhi: Kitab Bhavan, 2003), pp. 16, 27 f.; Abdulrahman Muhammad Alsumaih, "The Sunni Concept of Jihad in Classical Fiqh and Modern Islamic Thought" (PhD thesis, University of Newcastle Upon Tyne, 1998), pp. 191 f.

(d. 1936), *hijrah* means for Europeans "a change of location", but the Arabs have thought of it "as a change of relationship to one's tribe - to make the *hijrah* was to leave one's tribe and attach oneself to the *ummah*."[41] But even Watt does not seem to recognize that this change of relationship meant a change in the stance towards one's tribe. In other words, for the Prophet and the Muslims, being forced to leave their beloved Mecca, the holiest of all places, meant the initiation of war. Thus, H. Lammens clearly states: "In the old Arab law, the Hijra did not merely signify rupture with his [Prophet Muḥammad] native town, but was equivalent to a sort of declaration of war against it. The Me[cc]an guild were under no misapprehension [about this old Arab law]."[42]

It should be added here that the political system in Arabia was characterized by tribal or clan affiliation.[43] The tribe or the clan were the sources of the individual's security and sense of belonging. Thus, anyone expelled from a tribe was compelled to find another with which to ally himself.[44] "Each tribe or clan formed a separate and absolutely independent body."[45] A state of war was the norm between all tribes unless there was a peace treaty.[46] This explains the pre-Islamic practice of

[41] Watt, *Muhammad at Medina*, p. 242.
[42] H. Lammens, *Islām: Beliefs and Institutions*, trans. from the French by Sir E. Denison Ross (London: Methuen & Co. Ltd, 1929), p. 27. See also Stephen Akpiok-bisa Agilinko, "A Comparative Study of the Just War and Islamic Jihad Traditions: An Analytical Approach" (M.A. diss., University of Lancaster, 2002), p. 54.
[43] See Afzal Iqbal, *Diplomacy in Early Islam*, 4th ed. (Lahore: Institute of Islamic Culture, 1988), pp. 42 f.
[44] Mahmūd Shākir, *Al-Tārīkh al-Islāmī: Qabl al-Baʿthah wa al-Sīrah,* 8th ed. (Beirut: Al-Maktab al-Islāmī, 2000), p. 91.
[45] Arnold, *The Preaching of Islam*, p. 31; see also W. Montgomery Watt, "Badw", *Encyclopaedia of Islam*, New ed., Vol. I, pp. 889-892; Shākir, *Al-Tārīkh al-Islāmī*, p. 91; Majid Khadduri, *War and Peace in the Law of Islam* (Baltimore, MD.: Johns Hopkins University Press, 1955), p. 62.
[46] See Fred McGraw Donner, "The Sources of Islamic Conceptions of War", in John Kelsay and James Turner Johnson, eds., *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions* (Westport, Conn.: Greenwood Press, 1991), p. 34. According to Michael Bonner, "Islam arose in an environment where warfare – or at any rate, armed violence with some degree of organization and planning – was a characteristic of everyday life", Michael Bonner, *Jihad in Islamic History: Doctrines and Practices* (Princeton: Princeton University Press, 2006), p. 7.

weaker tribes having to make payments to stronger tribes for their protection.[47] Thus, the fact that they had been persecuted and driven out of their homes and tribes solely because of their beliefs was the Qur'ānic justification for permitting the Muslims to fight in their own defence against their oppressors (Qur'ān 22:39-40), as will be shown in Chapter Two. The enmity here was between a group known as Muslims and their Meccan persecutors, called in the Islamic sources *al-mushrikūn* or *al-Kuffār* (polytheists, idolaters or unbelievers). All the relevant Qur'ānic texts should be read in this context.

### 1.4 The Medinan Period

The Prophet's invitation to Yathrib (later known as Medina, lit. city) by a number of delegations, including a delegation of women, and their pledge of allegiance and support,[48] had both religious and political aspects, according to Watt. From the religious perspective, it meant accepting the new religion, while politically it meant accepting the Prophet as arbiter between the opposing factions of the then troubled Medina.[49] Justifying their invitation to the Prophet, they told him that they hoped that "God would unite them [the opposing factions at Medina] through you [the Prophet]".[50] The point to be noted here is that the Muslims had fled from Mecca to another troubled place, which was inhabited by several Jewish clans, idolaters and a few people who became Muslims. There was no recognized form of judicial or political authority in the "hostile city"[51] of Medina, as was the case throughout Arabia at that time. Each clan or tribe recognized only the authority of its leader.

[47] Watt, *Muhammad at Medina*, p. 246.
[48] Ibn Isḥāq, *Al-Sīrah*, Vol. 2, pp. 24-53; Guillaume, *The Life of Muhammad*, pp. 198-212; Watt, *Muhammad at Mecca*, pp. 144-149.
[49] Watt, *Muhammad at Medina*, p. 1; Watt, *Muhammad at Mecca*, pp. 143 f.
[50] Ibn Isḥāq, *Al-Sīrah*, Vol. 2, p. 25; Guillaume, *The Life of Muhammad*, p. 198.
[51] Arnold, *The Preaching of Islam*, p. 47. See also Watt, *Muhammad at Mecca*, p. 143.

This is why the Muslim delegates hoped that the Prophet would bring about peace in Medina. It is important for researchers into the tradition of war in Islam to study how the Prophet organized the relationship between Muslims and non-Muslims in the newly established state system.

The Prophet began his stay at Medina by building a mosque. A reflection on the first two extant Friday sermons indicates that the Prophet addressed monotheism and piety and called upon the people to love one another.[52] He mentions nothing about the nature of relations between the followers of different religions who were living in Medina. A document attributed to this period called *Ṣaḥīfah al-Madīnah* (translated in Western scholarship as the Constitution of Medina), is of paramount importance because it answers many questions about the nature of this newly established state system and its conception of nationhood, including war and peace.

There is general agreement on the authenticity of this document, although some Western scholars disagree about whether it was written before or after the battle of Badr (Ramaḍān 2/March 624). Some suggest that it may consist of more than one document.[53] Concerning its dating, as the biographers place it, the document must necessarily pre-date the battle of Badr, i.e., it must date to the first few weeks after the Prophet's arrival in Medina.[54] Biographers agree that the Prophet's first achievements there were building a mosque, forming a brotherhood between the Meccan Emigrants (*muhājirūn*) and the Helpers (*al-Anṣār*) and

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[52] Ibn Isḥāq, *Al-Sīrah*, Vol. 2, pp. 83 f.; Guillaume, *The Life of Muhammad*, pp. 230 f.

[53] See Watt, *Muhammad at Medina*, pp. 225-228; Frederick M. Denny, "Ummah in the Constitution of Medina", *Journal of Near Eastern Studies*, Vol. 36, No. 1, Jan., 1977, p. 39.

[54] See ʿAbd al-Raḥman ibn Khaldūn**,** *Tārīkh Ibn Khaldūn: Al-Musammā Dīwān al-Mubtadā' wa al-Khabar fī Tārīkh al-ʿArab wa al-Barbar wa man ʿĀṣarahum min Dhawī al-Sha'n al-Akbar*, ed. Khalīl Shiḥādah (Beirut: Dār al-Fikr, 2000/1421), Vol. 2, pp. 422 f.; Ṣubḥī al-Ṣaliḥī *ʿUlūm al-Ḥadīth wa Muṣṭalaḥuh: ʿArḍ wa Dirāsah*, 4th ed. (Beirut: Dār al-ʿIlm lil-Malāyīn, 1999), p. 29; Uri Rubin, "The 'Constitution of Medina' Some Notes", *Studia Islamica*, No. 62, 1985, p. 18; Mohammad Hashim Kamali, *A Textbook of Hadīth Studies: Authenticity, Compilation, Classification and Criticism of Ḥadīth* (Leicestershire: Islamic Foundation), 2005, p. 26.

concluding a treaty of peace and rapprochement with the Jews.[55] Forming the brotherhood between the Muslims and concluding peace with the Jews are what the document precisely attempts to achieve. The fact that it addresses the relationship between the Emigrants and the Helpers in the first half and the Jews and the Muslims in the second may support the claim that it was originally two documents, especially since there is a reference to the Jews at the end of the first part, but this evidence is not conclusive, for the purpose may have been to address first the relationship between the Muslims and second the relationship between the Muslims and the Jews in one document. Moreover, the part addressing the relationship of the Muslims with the Jews seems to be a continuation of the preceding articles of the document. As a result, biographers of the Prophet and Muslim scholars seem never think of it as more than a single document.

Furthermore, a report in al-Wāqidī's *Maghāzī* confirms that this document was written before Badr. It states that the Prophet concluded a written peace treaty with all the Jewish clans upon his arrival in Medina and that the Jewish clan of Banū Qaynuqāʿ was the first clan to break this treaty in the twentieth month after the Prophet's arrival.[56] Despite the importance of such an authentic document, it has not been given due "prominence"[57] by "Muslim writers or Western orientalists",[58] particularly in the formulation of the tradition of war in Islam.

The first sentence of the document contains a reference to the past form of the term jihād. It reads: "This is a writing from Muḥammad the Prophet between the believers and Muslims from Quraysh and Yathrib [Medina] and those who followed them, joined them and *jāhad* with them that they are one *ummah* (community or

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[55] See Ḥammīdullāh, *Battlefields*, pp. 16 f.
[56] Al-Wāqidī, *Al-Maghāzī*, Vol. 1, p. 165.
[57] See Watt, *Muhammad at Medina*, pp. 225-228.
[58] R.B. Serjeant, "The 'Constitution of Medina'", *The Islamic Quarterly*, Vol. VIII, No. 182, 1964/1384, p. 3.

nation) from among the people."[59] Guillaume translates *jāhad* here as "laboured",[60] R.B. Serjeant as "strive",[61] and Watt as "crusade".[62] At this point no fighting had taken place and the situation here involves Jews, since the document stipulates one nation formed from Jews and Muslims together. The whole context supports the meaning of the word *jāhad* as "strove" or "made an effort" to live peacefully together in this new *ummah* system.

The main points here are that the Constitution of Medina first stipulates a state system which makes the Prophet the head of state and, second, affirms that Medina is a *ḥaram* (a sanctuary) for all the parties to this document.[63] Significantly, this designation of Medina as a *ḥaram* means there is a total prohibition of violence or bloodshed in it. Thus, in the words of Uri Rubin, Medina "was made sacred, with strict rules against bloodshed, and its inhabitants were expected to protect and be devoted to it just as Quraysh were devoted to their own *ḥaram*."[64] Moreover, it affirms that if any disagreement or serious dispute arises, it should be referred to God and the Prophet.[65] The first half of the document enumerates a number of clans from Medina and makes them one *ummah* along with the Muslim immigrants from Quraysh. The second half enumerates a number of Jewish clans and makes one *ummah* of them with the Muslims. The inclusion of the Jews in this new *ummah* state and the affirmation that "the Jews have [the right to practise] their religion and the

[59] Ibn Isḥāq, *Al-Sīrah*, Vol. 2, p. 85; Guillaume, *The Life of Muhammad*, pp. 231 f.
[60] Guillaume, *The Life of Muhammad*, p. 232.
[61] R.B. Serjeant, "The *Sunnah Jāmiʿah*, Pacts with the Yathrib Jews, and the *Taḥrīm* of Yathrib: Analysis and Translation of the Documents comprised in the So-Called 'Constitution of Medina'", in Uri Rubin, ed., *The Life of Muḥammad*, The Formation of the Classical Islamic World, Vol. 4 (Aldershot: Ashgate, 1998), p. 168.
[62] Watt, *Muhammad at Medina*, p. 221. See also Iqbal, *Diplomacy in Early Islam*, p. 36.
[63] Haykal, *The Life of Muḥammad*, p. 182; Ḥammīdullāh, *Battlefields*, p. 17.
[64] Rubin, "The 'Constitution of Medina' Some Notes", p. 11. See also Ḥammīdullāh, *Battlefields*, p. 18.
[65] On the articles of the Constitution of Medina that attempted to bring about peace and end "conflict that had been plaguing the region for generations", see Yetkin Yildirim, "Peace and Conflict Resolution in the Medina Charter", *Peace Review*, Vol. 18, Issue 1, 2006, pp. 109-117.

Muslims have their own religion"[66] indicates that this *ummah* state, which emerged inside the tribal political system, "is no longer a purely religious community."[67]

Furthermore, the Constitution of Medina stipulates a collective defence agreement between the Jews and the Muslims in the case of an attack on either of them. Thus, the document makes Medina a *ḥaram* for all the parties mentioned in it and stipulates that none of the Jews should initiate a war without the permission of the Prophet unless it is in revenge. The document even calls for a form of mutual cooperation between Jews and Muslims by affirming that *wa inna baynahum al-nuṣḥ wa al-naṣīḥah* (indeed, mutual advice and consultation should exist between them, i.e., Muslims and Jews).[68] It also affirms the need for loyalty and for helping those who were wronged and confirms, as is argued above, that the state of relations between the Muslims and the Quraysh was a one of war following the persecution of the Muslims to the extent of forcing them to flee their home town twice. In one of its articles, the document stipulates that "no covenant of protection is given to the Quraysh or any of its helpers".[69] It is worth recalling here that, by the time the document was written, no battles between the armies of the Muslims and the Quraysh had yet taken place.

### 1.5 The Prophet's *Ghazawāt*

The harsh natural conditions of the Arabian Peninsula led to the pre-Islamic practice of *ghazw* (raiding), aimed at the acquisition of camels and other animals for their

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[66] Ibn Isḥāq, *Al-Sīrah*, Vol. 2, p. 86; Guillaume, *The Life of Muhammad*, p. 233.
[67] Watt, *Muhammad at Medina*, p. 241.
[68] This article is incorrectly translated by Serjeant as "There is good will and sincerity of intention between them", see his "The Sunnah Jāmiʿah, Pacts with the Yathrib Jews", p. 183; Firestone translates it as "There must be friendly counsel and mutual guidance between them", see Firestone, *Jihād*, p. 122.
[69] Ibn Isḥāq, *Al-Sīrah*, Vol. 2, p. 87; Guillaume, *The Life of Muhammad*, p. 233.

milk and meat.[70] Although it is difficult for the contemporary reader to conceive the exact culture of *ghazw*, especially because of the meaning its English translation carries, the whole practice of *ghazw* “was governed by elaborate protocol”.[71] According to Watt, it was “a normal feature of Arab desert life. It was a kind of sport rather than war. The Arabs had their wars indeed”.[72] Fred McGraw Donner also describes it as a “game” and states that this intertribal raiding at the time of the rise of Islam was “a frequent, almost routine part of life”[73] among the Northern Arabian tribes. Although it is beyond the scope of this study to give a satisfactory explanation of this pre-Islamic Arabian custom, it is believed that “in practice it [*ghazw*] operated as a fairly effective means of redistributing economic resources in a region where the balance could easily be upset by natural calamities”.[74]

Speaking about “war and peace” in his *The Political Language of Islam*, Bernard Lewis gives the “Oxford English Dictionary” definition of the word *razzia*, English for *ghazw*, as “a hostile incursion, foray or raid, for purpose of conquest, plunder, capture of slaves, etc., as practiced by the Mohammedan peoples in Africa”. He adds that the word *ghazw* “dates back to pre-Islamic Arabic, when it was used with much the same meaning”.[75] Giving this definition in the context of his discussion of fighting in jihād and the terms given to those whom he describes as its “frontiersmen, the march warriors who defended the far-flung frontiers of Islam and

[70] See Watt, “Badw”, pp. 889-892.
[71] T.M. Johnstone, “Ghazw”, *Encyclopaedia of Islam*, New ed., Vol. II, p. 1055.
[72] Watt, *Muḥammad: Prophet and Statesman*, p. 105; see also his *What is Islam?* (London: Longmans, 1968), pp. 108 f. On wars in pre-Islamic Arabia see, Ẓāfir al-Qāsimī, *Al-Jihād wa al-Ḥuqūq al-Dawliyyah al-ʿĀmmah fī al-Islām* (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1982), pp. 116-122. See also on pre-Islamic Mecca, Mahmood Ibrahim, “Social and Economic Conditions in Pre-Islamic Mecca”, *International Journal of Middle East Studies*, Vol. 14, No. 3, August 1982, pp. 343-358.
[73] Donner, “The Sources of Islamic Conception of War”, p. 34.
[74] Johnstone, “Ghazw”, p. 1055; Watt, *What is Islam?*, p. 108; Karen Armstrong, *Muhammad: A Biography of the Prophet*, paperback ed. (London: Phoenix, 2001), p. 169.
[75] Bernard Lewis, *The Political Language of Islam* (Chicago: University of Chicago Press, 1988), p. 74.

carried the war, by invasion or by raiding parties, into the territory of the enemy",[76] is misleading and distorts the entire tradition of war in Islam. The discussion of Lewis here leads to the conclusion that the meaning of jihād is included in this "Oxford English Dictionary" definition of the word *razzia*, mentioned above.

In fact, biographers used the words *ghazwah* and *sariyah* to describe many crucial events in the period of the Prophet's life at Medina, which are, however, not defined. This results in a considerable degree of misunderstanding as embodied in the definition quoted by Lewis above. Biographers used the word *ghazwah* to denote all the Prophet's travels as well as many of his encounters with non-Muslims and give different figures for the total number of these *ghazawāt,* such as 18, 19, 26, and 27. Different names are also given to the same incident, referring either to the name of the clan or tribe involved or to the locality in which it took place. It is common for the biographers to give different chronologies.[77] They even differed on what constitutes a *ghazwah*, in the sense that, if the Prophet left Medina and encountered two tribes before returning to Medina, some considered this one *ghazwah*, while others considered it two. They almost all agree that the Prophet was engaged in nine incidents of fighting.

A meticulous study of the Prophet's *ghazawāt* reveals that the meaning of the word has been confused with its pre-Islamic meaning. Biographers used the word *ghazwah* to refer to all the Prophet's journeys from Medina, whether to make peace-treaties and preach Islam to the tribes, to go on *'umrah*, to pursue enemies who attacked Medina, or to engage in the nine battles. It is worth recalling here that the

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[76] Ibid.

[77] See J.M.B. Jones, "The Chronology of the Maghāzī-A Textual Survey", in Uri Rubin, ed., *The Life of Muḥammad*, The Formation of the Classical Islamic World, Vol. 4 (Aldershot: Ashgate, 1998), pp. 193-228.

main concern of the biographers was merely to collect accounts about the life of the Prophet, not to study the tradition of war for its own sake.

Guillaume noticed that Ibn Isḥāq included the *ʿumrah* performed by the Prophet in 7/629 among the Prophet's 27 *ghazawāt*. Guillaume remarked in his translation that the number of *ghazawāt* is 26 and writes in a footnote that Ibn Isḥāq "has counted the Pilgrimage [*ʿumrah*] as a raid".[78] Indeed, Ibn Isḥāq was not mistaken here because this was one meaning of the word *ghazwah* at the time when he was writing. Moreover, al-Wāqidī also called it *ghazwah* al-Qaḍiyyah[79] (i.e., the fulfilled *ʿumrah ghazwah*), referring to the *ʿumrah* the Prophet performed the year after he was prevented from entering Mecca, because, according to the treaty of al-Ḥudaybiyah (6/628), the Prophet was permitted to enter Mecca only the following year. In this case, the Prophet's journey for *ʿumrah* is called a *ghazwah*. Thus, the word *ghazwah* can mean a journey and does not necessarily mean a raid or a *razzia*. To conclude: in this context, this meaning of the word *ghazwah* is one of the meanings the biographers had in mind when they attempted to describe every single instance of the Prophet's travels or encounters with non-Muslims. But this meaning is not found in Lane's Lexicon or any standard Arabic lexicon.

The nature of *ghazawāt* may be classified into the following two main categories:

### 1.5.1 Preaching and Making Peace Treaties

Nine of the Prophet's 27 *ghazawāt* discussed in what follows were expeditions to preach Islam and make peace treaties with the tribes, which were successful in two cases. In *ghazwah* al-Abwā (1), the Prophet made a written peace treaty with the clan

[78] Guillaume, *The Life of Muhammad*, p. 659.
[79] Al-Wāqidī, *Al-Maghāzī*, Vol. 2, pp. 185-192. See also Ibn Sayyid al-Nās, *ʿUyūn al-Athar*, Vol. 2, p. 203.

of Banū Ḍamarah[80] and in *ghazwah* al-ʿUshayr (3) he made peace treaties with the clan of Banū Mudlaj. Watt notes that "Some small clans or tribes made alliances with Muḥammad in the course of his expeditions [*ghazawāt*], probably pacts of non-aggression."[81] However, Firestone portrays the early *ghazawāt* of the Prophet as marauding attacks against the Quraysh and quotes a sentence from Ibn Isḥāq which leads to this misinformation. He quotes: "[Muḥammad] then went out to raid[82] in [the month of] Ṣafar, the beginning of the twelfth month from his arrival in Medina."[83] However, one sentence later the source he quotes reads: "The B. Ḍamra there made peace with him through their leader Makhshī b. ʿAmr al-Ḍamrī."[84] This example shows that using the word "raid" to translate *ghazwah* in the context of the incidents studied in this chapter is sometimes inaccurate and indeed misleading.

In six of these nine *ghazawāt*, the Prophet did not meet the clans or tribes who were his targets. No explanation is given and this might mislead readers about the nature and objectives of these *ghazawāt*. The reason contemporary readers are left to conclude from the geography of the region and culture of these tribes is that they were mobile nomads, so when the Prophet knew that they would be at a certain place, usually where their animals could find water, he went there to meet them, but, by the time the Prophet reached these places, they had already moved on. The Prophet did not make contact with the clans in any of the following *ghazawāt*: Buwāṭ (2), Banū Sulaym in al-Kudr (8), Dhū Amarr, also called Ghaṭafān (9), al-Furūʿ of Buḥrān (10), Dhāt al-Riqāʿ (14) and Dūmah al-Jandal (16). In Dhāt al-Riqāʿ, as the Prophet was travelling to meet three clans, he met one on his way, but the two parties

[80] For a translation of this treaty see Watt, *Muhammad at Medina*, p. 354.
[81] Watt, *Muḥammad: Prophet and Statesman*, p. 104; see also Watt, *Muhammad at Medina*, pp. 3 f.
[82] The exact words of Guillaume's translation are "went forth raiding", see Guillaume, *The Life of Muhammad*, p. 281.
[83] Firestone, *Jihād*, p. 131. See Guillaume, *The Life of Muhammad*, p. 281.
[84] Guillaume, *The Life of Muhammad*, p. 281; Ibn Isḥāq, *Al-Sīrah*, Vol. 2, p. 166.

were fearful of each other. They made no contact and the Prophet prayed with the Muslims “the prayer of fear”. In some of these *ghazawāt*, biographers add that the Prophet stayed at these places for a period of a few days, a month or even two months. The Prophet’s stay for a period of up to two months might suggest that he was involved in preaching.

Although Muslims study the accounts of the life of the Prophet to learn from his example and way of life, early biographers confined themselves to merely describing events. Modern biographers, however, give very brief explanations for these incidents. Mahmūd Shākir indicates that the aim of such early *ghazawāt* was to learn about each new place and preach Islam to the surrounding tribes, and to ensure that the tribes would not support the Quraysh if a war took place between the Quraysh and the Muslims.[85] In his encyclopaedic two-volume *Sīrah Khātam al-Nabiyyīn* (Biography of the Seal of the Prophets), Shaykh Abū Zahrah (1898-1974) writes only one sentence affirming that the Prophet’s expeditions were aimed at introducing Islam to the tribes: “calling [such expeditions] *ghazawāt* or the like does not mean war but preaching the call [i.e., the religion of Islam]”.[86] The reason that biographers do not give adequate explanatory information about these incidents is that they are addressed to Muslims, who could be expected to be aware of the relevant background.

### 1.5.2 Attacks on the Muslims and Series of Incidents

In the first *ghazwah* of Badr (4), “Kurz ibn Jābir al-Fihrī raided the pasturing camels of Medina.”[87] The Prophet, along with thirteen of the emigrants, searched for him

[85] Shākir, *Al-Tārīkh al-Islāmī*, p. 164.
[86] Muḥammad Abū Zahrah, *Sīrah Khātam al-Nabiyyīn* (Beirut: al-Maktabah al-ʿAṣriyyah, n.d.), p. 807.
[87] Guillaume, *The Life of Muhammad*, p. 286; Ibn Isḥāq, *Al-Sīrah*, Vol. 1, p. 176.

until they reached the neighbourhood of Badr, but in vain; they then returned to Medina. This incident is counted as one of the Prophet's *ghazawāt* simply because the Prophet took part in a search for the attacker, even though no encounter at all took place.

The state of war that had existed in Mecca between the Quraysh and the Muslims culminated in a series of attacks on the Muslims in Medina. The alleged intention of the Muslims to take the property of a Quraysh caravan in compensation for the property they had been forced to leave in Mecca was met by Abū Jahl's determination to prove the unchallengeable power of the Quraysh over Arabia. The reason for his determination to fight the Prophet (quoted below) is very important in understanding the nature of the conflict at this period. The leader of the caravan sent a messenger to the Quraysh to inform them that the caravan had passed Medina and was returning safely to Mecca. Hence, "two clans, Zuhrah and ʿAdī, withdrew completely"[88] from the march to Medina once they were sure that the caravan was safe. Abū Jahl, however, "forced Quraysh to advance" to Badr.[89] In his words, Abū Jahl wanted "the Arabs to hear about the Quraysh's march and huge gathering [army] so that they [the Arabs] would always be in awe of us [Quraysh] forever after".[90] Watt, however, argues that Abū Jahl "was presumably hoping to get rid of Muḥammad once for all."[91] However, the defeat of the Quraysh at the hands of a tiny group of Muslims was humiliating and catastrophic. For the Quraysh, the death of seventy men, including some of their leaders such as Abū Jahl, "was a disaster of the first magnitude".[92] Therefore, the Quraysh launched a series of attacks on the

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[88] Watt, *Muhammad at Medina*, p. 11; Armstrong, *Muhammad: A Biography of the Prophet*, p. 174.
[89] Watt, *Muhammad at Medina*, p. 11.
[90] Ibn Isḥāq, *Al-Sīrah*, Vol. 2, p. 192; Guillaume, *The Life of Muhammad*, p. 296; Ibn Khaldūn**,** *Tārīkh Ibn Khaldūn*, Vol. 2, p. 428.
[91] Watt, *Muhammad at Medina*, p. 11.
[92] Ibid., p. 14.

Muslims at Medina following their defeat in this battle known as *ghazwah Badr al-kubrā* (the great battle of Badr, (Ramaḍān 2/March 624) (5).

In al-Sawīq (7), Abū Sufyān, accompanied by two hundred (or, in some versions, four hundred) riders from the Quraysh, murdered two farmers and burnt some palm trees and houses on the outskirts of Medina. The Prophet went out after them but they had already returned to Mecca.[93] Some months later, to avenge the death of their distinguished relatives who had been killed in the great battle of Badr referred to above, a group from the Quraysh collected money from the revenues of the caravan after it had returned safely; this was the one for which they had gone to war at Badr (Ramaḍān 2/March 624). They prepared an army of three thousand men and marched to Medina in Shawwāl 3/March 625, where they defeated the Muslims at *ghazwah* Uḥud (11).[94] The next day, the Prophet went out with the Muslims in pursuit of the enemy until they reached a place called Ḥamrā' al-Asad. They stayed there for three days and then returned to Medina without meeting the Quraysh. This incident is called *ghazwah* Ḥamrā' al-Asad (12). The aim of this incident, according to Ibn Isḥāq, was to let the Quraysh know that the Muslims had not been weakened by their defeat.[95] It is worth noting here that, despite the enmity which was emerging between the Muslims and the Jews in Medina, a wealthy Jewish Rabbi called Mukhayriq fought and died with the Muslims in the battle against the Quraysh at Uḥud. He is even reported as asking other Jews to support the Prophet against the Quraysh attack.[96]

[93] Ibn Isḥāq, *Al-Sīrah*, Vol. 3, pp. 23 f.; Guillaume, *The Life of Muhammad*, pp. 361 f.
[94] Ibn Isḥāq, *Al-Sīrah*, Vol. 3, pp. 33-35; Guillaume, *The Life of Muhammad*, pp. 370-372.
[95] Ibn Isḥāq, *Al-Sīrah*, Vol. 3, pp. 60-63; Guillaume, *The Life of Muhammad*, pp. 389-391.
[96] Ibn Isḥāq, *Al-Sīrah*, Vol. 2, p. 101; Guillaume, *The Life of Muhammad*, p. 241; also Muḥammad ibn Jarīr al-Ṭabarī, *Tārīkh al-Ṭabarī: Tārīkh al-Umam wa al-Mulūk* (Bierut: Dār al-Kutub al-ʿIlmiyyah, 2001), p. 73.

At the battle of Uḥud, Abū Sufyān vowed to fight the Muslims again at the fair of Badr the following year. Thus, in what is known as the last *ghazwah* of Badr (15) the Prophet and Muslims attended the fair while Abū Sufyān and the men accompanying him turned back before reaching Badr.[97] Calling such an incident a *ghazwah* of the Prophet, even though the parties did not see each other, thus confirms that the word *ghazwah* was used to refer to any trip or expedition the Prophet made and does not necessarily mean a "raid" or "fighting".

In *ghazwah* Banū Liḥyān (19), the Prophet went out against the clan of Banū Liḥyān, who had assassinated the Muslim preachers at al-Rajīʿ. When the Prophet did not manage to meet them, he returned to Medina.[98] In *ghazwah* Dhū Qarad (20), ʿUyaynah ibn Ḥiṣn from the clan of Fazārah "with the cavalry of Ghaṭafān raided the apostle's milch-camels in al-Ghāba [on the outskirts of Medina]."[99] They killed the man who was in charge of them and captured his wife. The Prophet with some Muslims followed them and freed the woman and some of the camels. Two Muslims were killed, with one of the raiders.

The emerging *ummah* state system in Medina, which included Jews along with the Muslims, was a new form of affiliation that replaced the clan or tribal affiliation system. This *ummah* system required abiding by the political, economic and judicial system stipulated in the Constitution of Medina. While this Constitution makes every clan responsible for its financial obligations,[100] it made the Prophet the political and judicial authority of the community of Medina.

According to Ibn Isḥāq and Ibn Saʿd, the Jewish clan of Banū Qaynuqāʿ broke the treaty with the Prophet and fought against him between Badr and Uḥud.

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[97] Ibn Isḥāq, *Al-Sīrah*, Vol. 3, pp. 121-123; Guillaume, *The Life of Muhammad*, pp. 447-449.
[98] Ibn Isḥāq, *Al-Sīrah*, Vol. 3, pp. 195 f.; Guillaume, *The Life of Muhammad*, pp. 485 f.
[99] Guillaume, *The Life of Muhammad*, p. 486; Ibn Isḥāq, *Al-Sīrah*, Vol. 3, p. 160.
[100] For a discussion of the financial aspects addressed by the Constitution see Watt, *Muahmmad at Medina*, pp. 250-260.

According to a report in al-Wāqidī and al-Dhahabī, fighting broke out in the market and a Jew and a Muslim were killed in this incident because a Jew "stealthily pinned [a Muslim woman's] skirt to the back of her upper garments so that when she stood up she exposed herself."[101] The Prophet therefore besieged this clan in what is called *ghazwah* Banū Qaynuqāʿ (6), until they were deported from Medina without fighting, "in accordance with Arab custom".[102]

In another incident, ʿAmr ibn Umayyah al-Ḍamarī from the Jewish clan of Banū al-Naḍīr, killed two men from the clan of Banū ʿĀmir. The Prophet therefore went to the man's clan asking them to pay the blood-money for the two men, in accordance with the pact between the two clans. After the Banū al-Naḍīr plotted "to assassinate"[103] the Prophet, he sent them an order to evacuate Medina "because of their perfidy and violation of the"[104] Constitution of Medina. They "refused to comply and announced hostility. Upon this the Prophet marched and besieged"[105] them until they were deported from Medina without fighting after a siege that lasted for six nights in what is called *ghazwah* Banū al-Naḍīr (13).[106] Medina has a long history of internecine struggles. "It is noteworthy that, before Islam, the Medinan

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[101] Armstrong, *Muhammad: A Biography of the Prophet*, p. 184. See also Wāqidī, *Al-Maghāzī*, Vol. 1, pp. 176-180; Muḥammad ibn Saʿd, *Al-Ṭabaqāt al-Kubrā*, ed. Muḥammad ʿAbd al-Qādir ʿAṭā, 2nd ed. (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1997/1418), Vol. 2, pp. 21 f.; Tawfīq Wahbah, *Al-Ḥarb fī al-Islām wa fī al-Mujtamaʿ al-Dawlī al-Muʿāṣir*, Kutub Islāmiyyah, Issue 145 (Cairo: Supreme Council for Islamic Affairs, 1973/1393), pp. 57 f.; Alsumaih, "The Sunni Concept of Jihad", pp. 186 f.

[102] Karen Armstrong, *Islam: A Short History* (London: Phoenix Press, 2000), p. 18; Armstrong, *Muhammad: A Biography of the Prophet*, p. 185.

[103] Armstrong, *Islam: A Short History*, p. 18; Armstrong, *Muhammad: A Biography of the Prophet*, p. 194. See Ibn Isḥāq, *Al-Sīrah*, Vol. 3, pp. 109 f.; Guillaume, *The Life of Muhammad*, p. 437; Aḥmad ibn Yaḥyā ibn Jābir al-Balādhūrī, *The Origins of the Islamic State: Being a Translation from the Arabic Accompanied with Annotations Geographic and Historic Notes of the Kitāb Futūḥ al-Buldān of al-Imām Abū-l ʿAbbās Aḥmad Ibn Jābir al-Balādhuri*, Columbia University Studies in the Social Sciences, No. 163, trans. Philip Khūri Hitti (New York: AMS Press, 1968), Vol. I, p. 34; Aḥmad Ghunaym, *Al-Jihād al-Islāmī: Dirāsah ʿIlmiyyah fī Nuṣūṣ al-Qur'ān wa Ṣiḥāḥ al-Ḥadīth wa Wathā'iq al-Tārīkh* (Cairo: Dār al-Ḥammamī, 1975/1394), p. 28; Alsumaih, "The Sunni Concept of Jihad", p. 187.

[104] Al-Balādhūrī, *The Origins of the Islamic State*, Vol. I, p. 34.

[105] Ibid.

[106] See Ibn Isḥāq, *Al-Sīrah*, Vol. 3, pp. 109-117; Guillaume, *The Life of Muhammad*, pp. 437-445.

Leader ʿAmr ibn Annuʿman seriously thought of deporting a[l]-Ṇadir and Qurayẓah because of their hostility to the other Arabs of Medina."[107]

Because of their deportation from Medina to Khaybar, a group from the Banū al-Naḍīr went to the Quraysh and urged them to join in war against the Prophet. After receiving four thousand men from Quraysh in support, this group invited the clans of Ghaṭafān, Banū Sulaym, Banū Fazarah, Ashjaʿ, Banū Asad and Banū Murrah, who together formed an army of ten thousand men. Because of this gathering of clans, this attack is called *ghazwah* al-Aḥzāb (the parties). It is also called the *ghazwah* of the Ditch (17) because the Muslims "dug a trench around Medina"[108] which prevented their being massacred since they numbered less than one third of their attackers. This coalition of clans besieged Medina for about a fortnight.[109]

Because of their support for the attackers at the battle of the Ditch, the Prophet besieged the clan of Banū Qurayẓah in their fortresses for more than two weeks. Eventually they agreed to put an end to this issue by choosing[110] Saʿd ibn Muʿādh, who was their ally, to arbitrate in this dispute. Ibn Muʿādh, who was suffering from an arrow wound received at the *ghazwah* of the Ditch and died shortly afterwards, was called on for arbitration. He decreed that all the *muqātilah* (the men who were able to fight) should be put to death. The sources give various numbers for the men who were executed as a consequence of this decree, putting it at two hundred,[111] four hundred, six hundred, seven hundred, eight hundred or nine

[107] Muḥammad Ṭalaat al-Ghunaimi, *The Muslim Conception of International Law and the Western Approach* (The Hague: Martinus Nijhoff, 1968), note 2, p. 39.
[108] Ibn Isḥāq, *Al-Sīrah*, Vol. 3, p. 124; Guillaume, *The Life of Muhammad,* p. 450.
[109] Ibn Isḥāq, *Al-Sīrah*, Vol. 3, pp. 123-134; Guillaume, *The Life of Muhammad*, pp. 450-460.
[110] ʿAlī ibn Muḥammad ibn Ḥabīb al-Māwardī, *Al-Ḥāwī al-Kabīr: Fī Fiqh Madhhab al-Imām al-Shāfiʿī Raḍī Allah ʿanh wa huwa Sharḥ Mukhtaṣar al-Muznī*, ed. ʿAlī Muḥammad Muʿawwaḍ and ʿĀdil Aḥmad ʿAbd al-Mawjūd (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1999), Vol. 14, p. 280.
[111] Aḥmad ibn ʿAbd al-Ḥalīm ibn Taymiyyah, *Qāʿidah Mukhtaṣarah fī Qitāl al-Kuffār wa Muhādanatihim wa Taḥrīm Qatlihim li-Mujarrad Kufrihim: Qāʿidah Tubayyn al-Qiyam al-Sāmiyah*

hundred.[112] One woman was also put to death because she killed Khallād ibn Suwayd.[113] Strangely enough, there is no indication in the sources that there was any resistance to this sentence.[114] This incident is known as *ghazwah* Banū Qurayẓah (18).[115] It is pointed out that this sentence was given according to the rules of Banū Qurayẓah's own religion, specifically the Book of Deuteronomy (20:10-15).[116]

The Prophet marched to Khaybar because they had joined in the attack at the battle of the Ditch.[117] In *ghazwah* Khaybar (23), biographers mainly confine themselves to describing the incident, rather than explaining the reasons for it. According to one report, while the Prophet was preaching at Khaybar, one among a group of fighters declaimed some verses of poetry about himself, calling for a warrior to fight him.[118] According to a report in *Al-Ṭabaqāt*, the Prophet told ʿAlī ibn Abī Ṭālib to fight against Khaybar until they believed that there is no god but God and that Muḥammad is a Messenger of God. While this report suggests fighting for

*lil-Ḥaḍārah al-Islāmiyyah fī al-Ḥarb wa al-Qitāl*, ed. ʿAbd al-ʿAzīz ibn ʿAbd Allah ibn Ibrāhīm al-Zayd Āl Ḥamad (Riyadh: N.p., 2004/1424), p. 103.

[112] See, for example, Mahdī Rizq Allah Aḥmad, *Al-Sīrah al-Nabawiyyah fī Ḍaw' al-Maṣādir al-Aṣliyyah: Dirāsah Taḥlīliyyah* (Riyadh: Markaz al-Malik Faīṣal lil-Biḥūth wa al-Dirāsat al-Islāmiyyah, 1992/1412), pp. 459-464; ʿAbd al-Ḥamīd Shākir, *Ghazawāt al-Rasūl* (Tripoli, Lebanon: Jarrūs Press, 1996/1416), pp. 80-82.

[113] Aḥmad, *Al-Sīrah al-Nabawiyyah fī Ḍaw' al-Maṣādir al-Aṣliyyah*, p. 462; Muḥammad ibn al-Ḥasan al-Shaybānī, *Al-Siyar al-Kabīr*, ed. Ṣalāḥ al-Dīn al-Munjid (Cairo: Maʿhad al-Makhṭūṭāt, n.d.), Vol. 4, p. 1420. See also Shākir, *Ghazawāt al-Rasūl*, p. 82.

[114] See Armstrong, *Muhammad: A Biography of the Prophet*, pp. 203-209.

[115] Ibn Isḥāq, *Al-Sīrah*, Vol. 3, pp. 134-145; Guillaume, *The Life of Muhammad*, pp. 461-469.

[116] See Muḥammad Ḥammīdullāh, *Muslim Conduct of State: Being a Treatise on Siyar, That is Islamic Notion of Public International Law, Consisting of the Laws of Peace, War and Neutrality, Together with Precedents from Orthodox Practice and Preceded by a Historical and General Introduction*, rev. & enl. 5th ed. (Lahore: Sh. Muhammad Ashraf, 1968), pp. 241 f.; Ḥammīdullāh, *Battlefields*, p. 3, footnote no. 1; Ahmed Zaki Yamani, "Humanitarian International Law in Islam: A General Outlook", *Michigan Yearbook of International Legal Studies*, Vol. 7, 1985, p. 203; Marcel A. Boisard, *Jihad: A Commitment to Universal Peace* (Indianapolis, Ind.: American Trust Publications, 1988), p. 38; Martin Lings, *Muhammad: His Life Based on the Earliest Sources* (Cambridge: Islamic Texts Society, 1991), p. 232; P.J. Stewart, *Unfolding Islam*, 2nd ed. (Reading, Berkshire: Garnet Publishing, 2008), p. 85.

[117] Shākir, *Al-Tārīkh al-Islāmī*, p. 286.

[118] Shams al-Dīn Muḥammad ibn Aḥmad ibn ʿUthmān al-Dhahabī, *Tārīkh al-Islām wa Wafayāt al-Mashāhīr wa al-Aʿlām: Al-Māghazī*, ed. ʿUmar ʿAbd al-Salām Tadmurī, 2nd ed. (Beirut: Dār al-Kitāb al-ʿArabī, 1990/1410), p. 415.

religion until the people of Khaybar became Muslims, this incident, in fact, resulted in an agreement that stipulated that they were to pay half the produce of the land.[119]

As for *ghazwah* Banū al-Musṭaliq (21), the Prophet received news that al-Ḥārith ibn Abī Ḍirār was gathering the clan of al-Musṭaliq to fight against him. The Prophet sent Buraydah ibn al-Ḥuṣayb al-Aslamī to verify this news. When Buraydah confirmed that al-Ḥārith was preparing for war, the Prophet went out against him. Fighting occurred and one Muslim is said to have been killed. Al-Wāqidī states that ten from al-Musṭaliq were killed, but according to Ibn ʿAbd al-Bar not one of them was killed.[120]

In *ghazwah* al-Ḥudaybiyah (22), the Prophet set out for Mecca to perform *ʿumrah* in (6/628). He put on the *iḥrām* garb so that the Quraysh would not think that he had come to wage war.[121] At al-Ḥudaybiyah, eight miles from Mecca, negotiations were held between the Prophet and the Quraysh and they concluded a written pact.[122] According to it, the Prophet was not permitted to enter Mecca for *ʿumrah* that year, but could go for three days the following year. Significantly, they justified this refusal by their fear that the Arabs might think that the Prophet had forced his way into Mecca.[123] This reflects the same way of thinking shown by Abū Jahl in his justification for forcing the Quraysh to advance to Badr, mentioned above. That is to say, the Quraysh wanted to show that they had unchallengeable power over Arabia.

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[119] Ibn Isḥāq, *Al-Sīrah*, Vol. 3, pp. 189-208; Guillaume, *The Life of Muhammad*, pp. 510-526.

[120] Al-Wāqidī, *Al-Maghāzī*, Vol. 1, pp. 341-345. Ibn Isḥāq, *Al-Sīrah*, Vol. 3, pp. 165-169; Guillaume, *The Life of Muhammad*, pp. 490-493; Alsumaih, "The Sunni Concept of Jihad", pp. 41 f.

[121] Ibn Isḥāq, *Al-Sīrah*, Vol. 3, p. 177; Guillaume, *the Life of Muhammad*, pp. 499 f.; Akram Ḍiyā' al-ʿUmarī, *Madīnan Society at the Time of the Prophet: The Jihād against the Mushrikūn*, Vol. II, Issues in Islamic Thought (3): II, trans. Hudā Khaṭṭāb (Herndon, Virginia: International Institute of Islamic Thought, 1991), p. 107.

[122] For a translation of the contents of the treaty see, Iqbal, *Diplomacy in Early Islam*, pp. 54 f.

[123] Ibn Isḥāq, *Al-Sīrah*, Vol. 3, p. 182; Guillaume, *the Life of Muhammad*, p. 504. See Muhammad Abdel Haleem, *The 'Sword Verse' Myth* (London: School of Oriental and African Studies, 2007), p. 3.

The Prophet stipulated that there should be an armistice for ten years and added that anyone who wanted to form an alliance with him or with the Quraysh might do so. Thereupon, the clan of Khuzāʿah formed an alliance with the Prophet while the clan of Banū Bakr formed an alliance with the Quraysh. After two years (in 8/630), the Quraysh broke this armistice by arming and fighting with the clan of Banū Bakr against Banū Khuzāʿah in the vendetta between these two clans, so the Prophet marched in *ghazwah fatḥ Makkah* (24)[124] to take control of Mecca.

Chapter 48 of the Qur'ān, significantly entitled "*al-Fatḥ*" (the victory) considers this armistice secured at al-Ḥudaybiyah "*fatḥā mubīnā*" (lit. a great opening, i.e., a great victory) for Islam.[125] It is worth adding here that, two years after this ceasefire, the number of Arabs who had embraced Islam outnumbered those who embraced Islam over the period of the first nineteen years, i.e., since the advent of Islam.[126] So while the Muslims accompanying the Prophet at al-Ḥudaybiyah (6/628), nineteen years after the advent of Islam, numbered one thousand four hundred, within two years the men accompanying him in the march to Mecca (8/630) numbered ten or twelve thousand. Ibn Isḥāq states: "No previous victory in Islam was greater than this. There was nothing but battle when men met; but when there was an armistice and war was abolished and men met in safety and consulted

[124] Ibn Saʿd calls it *ghazwah ʿĀm al-fatḥ* (lit. *ghazwah* of the year of the opening).
[125] See, for example, al-Wāqidī, *Al-Maghāzī*, Vol. 2, p. 95; al-Quṭb Muḥammad al-Quṭb Ṭabliyyah, *Al-Islām wa Ḥuqūq al-Insān: Al-Jihād* ([Cairo]: Dār al-Fikr al-ʿArabī; al-Nahḍah al-Miṣriyyah; al-Mujallad al-ʿArabī, al-Ṣaḥwah, 1989/1409), p. 85; Armstrong, *Muhammad: A Biography of the Prophet*, p. 223; Iqbal, *Diplomacy in Early Islam*, p. 59; ʿAlī Muḥyī al-Dīn al-Qarah Dāghī, "Al-Usus wa al-Mabādi' al-Islāmiyyah lil-ʿAlāqāt al-Dawliyyah", *Scientific Review of the European Council for Fatwa and Research*, May 2007, Issues 10-11, Part 1, p. 165; Yūsuf al-Qaraḍāwī, *Fiqh al-Jihād: Dirāsah Muqāranah li-Aḥkāmih wa Falsafatih fī Ḍaw' al-Qur'ān wa al-Sunnah* (Cairo: Maktabah Wahbah, 2009), Vol. 1, pp. 416 f.
[126] Al-Wāqidī, *Al-Maghāzī*, Vol. 2, p. 95; al-Māwardī, *Al-Ḥāwī*, Vol. 14, p. 51; Aḥmad Shalabī extends this period to twenty years. See Aḥmad Shalabī, *Al-Jihād wa al-Nuẓum al-ʿAskariyyah fī al-Tafkīr al-Islāmī*, Mawsūʿah al-Nuẓum wa al-Ḥaḍārah al-Islāmiyyah 6, 2nd ed. (Cairo: Maktabah al-Nahḍah al-Miṣriyyah, 1974), p. 38.

together none talked about Islam intelligently without entering it."[127] Thus, Karen Armstrong considers the treaty of al-Ḥudaybiyah a turning-point that made "conversion to Islam even more of an irreversible trend".[128] The reason, as explained by Ibn Isḥāq above, is that the armistice put an end to war, the normal state of relations between clans in Arabia, and gave people the chance to know about the religion of Islam.[129] However, Donner interprets this truce as a turning point in the Prophet's life that brought about political "power and prestige".[130]

After the Prophet entered Mecca in 8/630, Mālik ibn ʿAwf al-Anṣārī gathered the clan of Hawāzin to fight the Prophet and "assembled to him also all Thaqīf and all Naṣr and Jusham; and Saʿd b. Bakr, and a few men from B. Hilāl."[131] According to another account in al-Ṭabarī, these groups had already gathered to fight against the Prophet when he left Medina for Mecca. They assumed that he was coming out against them. But when they knew that he had settled in Mecca, they marched to fight him at Ḥunayn, three miles from Mecca. When the Prophet heard about their march, he sent ʿAbd Allah ibn Abī Ḥaḍrat al-Aslamī to confirm the news. After confirmation that they had marched to fight, the Prophet borrowed weapons from Ṣafwān ibn Umayyah, a Meccan idolater. It is worth mentioning here that eighty idolaters, including Ṣafwān, fought on the Prophet's side in this battle.[132] In the

[127] Guillaume, *The Life of Muhammad*, p. 507; Ibn Isḥāq, *Al-Sīrah*, Vol. 3, p. 186. See also al-Wāqidī, *Al-Maghāzī*, Vol. 2, pp. 95, 106; Ibn Khaldūn**,** *Tārīkh Ibn Khaldūn*, Vol. 2, p. 448; Arnold, *The Preaching of Islam*, p. 37.

[128] Armstrong, *Islam: A Short History*, p. 20.

[129] See Ibn Isḥāq, *Al-Sīrah*, Vol. 3, p. 186; Guillaume, *The Life of Muhammad*, p. 507, al-Wāqidī, *Al-Maghāzī*, Vol. 2, p. 106; Abū Zahrah, *Sīrah Khātam al-Nabiyyīn*, pp. 1022-1025.

[130] Fred McGraw Donner, "Muḥammad's Political Consolidation in Arabia up to the Conquest of Mecca", *The Muslim World*, Vol. LXIX, No. 2, 1979, p. 230.

[131] Guillaume, *The Life of Muhammad*, p. 566; Ibn Isḥāq, *Al-Sīrah*, Vol. 4, p. 50. See also Ṣaqr, *Falsafah al-Ḥarb*, pp. 49 f.; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, pp. 349 f.

[132] Aḥmad ʿUmar Hāshim, "Ma'sāh al-Ghazw al-ʿIrāqī wa Wājib al-ʿArab wa al-Muslimīn", *The Islamic Fiqh Council Journal*, Issue No. 5, [1991/1411], p. 113; Muḥammad Ra'fat ʿUthmān, "Iʿtidā' Ṣaddām ʿalā al-Kuwayt Munkar Yajib Izālatih maʿa Ṣiḥḥah al-Istiʿānah bi-Quwwāt min ghayr al-Muslimīn", *The Islamic Fiqh Council Journal*, Issue No. 5, [1991/1411], p. 181; Mohamed Mokbel Mahmud Elbakry, "The Legality of 'War' in Al-Shariʿa Al-Islamiya (The Islamic Law) and

words of Watt, the Prophet “had no hesitation about accepting non-Muslims as allies. Moreover, apart from the pagan Meccans [who fought] at Ḥunayn, there are several instances of men fighting under Muḥammad before they became Muslims.”[133] At *ghazwah* Ḥunayn (25), the Muslims defeated Thaqīf who then retreated to their fortresses at al-Ṭā’if. The Muslims besieged them for some days in what is called *ghazwah* al-Ṭā’if (26). Twelve Muslims were shot dead by arrows and hot iron and fighting stopped soon afterwards.[134]

In *ghazwah* Tabūk (27), the Prophet marched to Tabūk to confront the Byzantines, Lakhm, Judhām, Ghassān and ʿĀmilah, who were gathering to attack him. The Syrian traders who brought this news told the Muslims that this army had reached al-Balqā’ and was camping there.[135] It is probable that the story of this gathering was only a rumour, as al-Wāqidī remarks,[136] because there is no indication of any confrontation or preparation for war. Moreover, Ibn Isḥāq adds: “When the apostle reached Tabūk Yuḥanna b. Rū’ba governor of Ayla came and made a treaty with him and paid him the poll tax. The people of Jarba and Adhruḥ also came and paid the poll tax.”[137]

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Contemporary International Law: Comparative Study” (PhD thesis, University of Glasgow, 1987), p. 308.

[133] Watt, *Muhammad at Medina*, p. 246.

[134] See, for example, Ibn Isḥāq, *Al-Sīrah*, Vol. 4, pp. 74-77; Guillaume, *The Life of Muhammad*, p. 587-591; al-Wāqidī, *Al-Maghāzī*, Vol. 2, pp. 332, 240; Haykal, *The Life of Muḥammad*, pp. 421-424; Salahi, *Muhammad Man and Prophet*, p. 659; Ṣaqr, *Falsafah al-Ḥarb*, pp. 56-63.

[135] Al-Wāqidī, *Al-Maghāzī*, Vol. 2, p. 379; Aḥmad ibn Yaḥyā ibn Jābir al-Balādhūrī, *Futūḥ al-Buldān*, ed. ʿAbd al-Qādir Muḥammad ʿAlī (Beirut: Dār al-Kutub al-ʿIlmiyyah), 2000, p. 43; Muḥammad ʿIzzat Darwazah, *Al-Jihād fī Sabīl Allah fī al-Qur’ān wa al-Ḥadīth*, 2nd ed. (Beirut: Al-Nāshir, 1990), pp. 58-60; Abdel Haleem, *The ‘Sword Verse’ Myth*, p. 4; ʿAbd Allah ibn Zayd Āl Maḥmūd, *Al-Jihād al-Mashrūʿ fī al-Islām: Wa Talīhā Risalah "Qāʿidah fī Qitāl al-Kuffār" li-Shaykh al-Islām Ibn Taymiyyah* (Doha: Maṭābiʿ ʿAlī bin ʿAlī, n.d.), p. 41.

[136] Al-Wāqidī, *Al-Maghāzī*, Vol. 2, p. 379.

[137] Guillaume, *The Life of Muhammad*, p. 607; Ibn Isḥāq, *Al-Sīrah*, Vol. 4, p. 98.

### 1.6 The *Sarāyā*

The word *sariyah* refers to expeditions allegedly sent by the Prophet for several objectives, such as to preach Islam, get news of what the Quraysh were planning, return stolen property, fight against those who were preparing to attack Medina, kill an individual for the same reason, fight those who killed one of the Prophet's messengers and, in five instances, to destroy Quraysh idols after the taking of Mecca. In most instances, biographers give their account in the form of a narration of the incidents, without explaining the background and objectives of these expeditions, and they give different totals for these incidents, such as 35, 38, 47, and 56. These differences indicate that each biographer arrived at his own conception of what constituted a *sariyah*. For example, Ibn Saʿd at the beginning of his book, following his teacher al-Wāqidī, states that the number of *sarāyā* sent by the Prophet was forty-seven, while the present study finds that he ends up referring to fifty-six *sarāyā*. Some biographers used the word *ghazwah* to refer to incidents others called *sariyah*, while some used the word *baʿth* (delegation) in the same context. In many incidents, no encounter at all occurred with the clans. A number of incidents involved fighting and in some cases the number of victims is not given. According to the numbers that are given, eighty Muslims were killed, including sixty-nine preachers who were assassinated in one incident, while sixty-five non-Muslims were also killed. These accounts of *sarāyā* are a much less credible source than those of the *ghazawāt*, not only because of the lack of clarity and details about the reasons for and objectives of such minor incidents, but also because the narrations are not scrutinized and in some cases are unconvincing as stories.

Three of these *sarāyā* are briefly discussed below. One gives an example of the difficulties facing researchers on war in Islam, while two shed some light on the

situation in Medina. In *sariyah* ʿAbd Allah ibn Jaḥsh, the Prophet sent eight Muslims to Nakhlah,[138] a place between Mecca and al-Ṭā'if. The point to be addressed here is the objective of this *sariyah*. Ibn Isḥāq's wording of the phrase expressing the objective of this *sariyah*: *ārṣud bihā Qurayshā, ḥattā ātīh minhum bi-khabar*[139] is translated by Guillaume as "Lie in wait there [at Nakhlah] for the Quraysh and find out for us what they are doing."[140] But Watt and many Western researchers base their study of this incident on al-Wāqidī's wording of the phrase expressing the aim of this *sariyah* as *fataraṣṣaḍ bihā ʿaīr Quraysh*.[141] They incorrectly understand this phrase to mean "ambush a Meccan caravan."[142] It is worth adding here that all the biographical sources use the former phrase and even al-Wāqidī, the source of the second phrase, mentions a narration which confirms the first report. Because of these linguistic and contextual difficulties for researchers in their study of such incidents, Watt, in his attempt to construct an account of what happened in this one, admits that "among the probabilities and uncertainties through which we have been wading there is a little firm ground."[143] Unfortunately, many Western theories on the tradition of war in Islam have been constructed upon these admittedly flimsy "probabilities and uncertainties", as explained below.

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[138] Al-Wāqidī remarks that it is said that the number was twelve or thirteen, but he affirms the number was eight. See al-Wāqidī, *Al-Maghāzī*, Vol. 1, p. 32.

[139] Ibn Isḥāq, *Al-Sīrah*, Vol. 2, p. 177. See also, for example, Ibn Khaldūn**,** *Tārīkh Ibn Khaldūn*, Vol. 2, p. 426; al-Māwardī, *Al-Ḥāwī*, Vol. 14, p. 25; Ibn Sayyid al-Nās, *ʿUyūn al-Athar*, Vol. 1, p. 359; al-ʿUmarī, *Madīnan Society at the Time of the Prophet*, p. 20; Haykal, *The Life of Muḥammad*, p. 208; Salahi, *Muhammad Man and Prophet*, p. 246; al-Ṭabarī, *Tārīkh al-Ṭabarī*, Vol. 2, p. 348; Ismāʿīl ibn ʿUmar ibn Kathīr, *Tafsīr al-Qur'ān al-ʿAẓīm* (Beirut: Dār al-Fikr, 1980-1/1401), Vol. 1, p. 254; Muḥammad ibn Aḥmad al-Anṣārī al-Qurṭubī, *Al-Jāmiʿ li-Aḥkām al-Qur'ān* (Cairo: Dār al-Shaʿb, n.d.), Vol. 3, p. 41; Riḍā, *Tafsīr al-Manār*, Vol. 2, p. 313; Ṭanṭāwī, *Al-Sarāyā al-Ḥarbiyyah*, p. 43; al-Ḥifnī, *Mawsūʿah al-Qur'ān*, Vol. 2, p. 1910; Alsumaih, "The Sunni Concept of Jihad", p. 123. The objective of this incident was, according to Bruce B. Lawrence, "to spy on a caravan to the south." See Lawrence, *The Qur'ān*, p. 42.

[140] Guillaume, *The Life of Muhammad*, p. 287. The group of eight Muslims sent by the Prophet in this *sariyah* under the command of ʿAbd Allah ibn Jaḥsh is described by al-Mubarak as: "a reconnaissance division whose aim was to reconnoitre Quraysh's information and movement." See Malik Abdulazeez al-Mubarak, "Warfare in Early Islam" (PhD thesis, University of Glasgow, 1997), p. 84.

[141] Al-Wāqidī, *Al-Maghāzī*, Vol. 1, p. 28.

[142] Watt, *Muhammad at Medina*, p. 5.

[143] Ibid., p. 9.

The point here is that biographers were not primarily concerned with describing what happened but rather with reporting what was said about what happened, and contradictory or inaccurate reports are unreliable sources for constructing theories on the tradition of war in Islam. In dealing with such narrations, researchers use their imagination to determine what actually happened so that they can construct their theories. These imaginative approaches to interpreting, and then assessing, these incidents are the origin of the many polemical theories on the tradition of war in Islam, which are determined, to a great extent, by whether the researchers interpret and assess these incidents within their contexts and according to the norms, culture and mentality of the people involved in the incidents, or whether they approach them with the mindset of the 21st century.

The following incidents give some insights into the culture in which Islam emerged. In *sariyah* Bi'r Maʿūnah,[144] ʿĀmir ibn Mālik ibn Jaʿfar asked the Prophet to send some Muslims to preach Islam to his people in Najd. After receiving confirmation that they would be protected, the Prophet sent forty (or according to Ibn Kathīr seventy) *qurrā'* (Muslim preachers who had memorized the Qur'ān).[145] When they reached a place called Bi'r Maʿūnah, all the Muslims were assassinated except for Kaʿb ibn Zayd, who was left for dead.

In a similar incident, called *ghazwah* al-Rajīʿ,[146] the Prophet sent six (or ten) preachers at the request of a group from the clans of ʿAḍal and al-Qārah to teach Islam to their peoples. On their way, they were betrayed to the clan of Banū Liḥyān, who told the Muslims that they would not be killed but would be handed over to the

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[144] Ibn Saʿd calls this incident "Sariyah al-Mundhir ibn ʿAmr", see Ibn Saʿd, *Al-Ṭabaqāt*, Vol. 2, pp. 39-42. See Ibn Isḥāq, *Al-Sīrah*, Vol. 3, pp. 106-109; Guillaume, *The Life of Muhammad*, pp. 433-436; al-Dhahabī, *Al-Māghazī*, pp. 235-241; Abū Zahrah, *Sīrah Khātam al-Nabiyyīn*, pp. 885-887.
[145] Ibn Kathīr, *Al-Sīrah*, Vol. 1, p. 136.
[146] Ibn Saʿd calls this incident "Sariyah Marthad ibn Abī Marthad", see Ibn Saʿd, *Al-Ṭabaqāt*, Vol. 2, pp. 42 f. See Ibn Isḥāq, *Al-Sīrah*, Vol. 3, pp. 98-105; Guillaume, *The Life of Muhammad*, pp. 426-433; al-Dhahabī, *Al-Māghazī*, pp. 230-235.

Quraysh as part of an exchange. Four of these Muslims were killed and, in return for two captives, two were given to people from the Quraysh whose relatives had been killed at Badr. When these two Muslims refused to recant,[147] they were brutally murdered.[148] Thus, this incident gives a picture of the vendetta situation in Arabia and how it contributed to the series of hostile actions discussed above.

## 1.7 Building a Theory of the Prophet's Wars

Muslim and non-Muslim scholars have developed various theories about the nature of the hostilities referred to above that took place between the Muslims and their enemies during the Prophet's lifetime. Despite the difficulties facing modern scholars of this period, it is of paramount importance to study the incidents that led to the wars and to analyse the objectives of the people involved in them. This is why the above discussion of the so-called *ghazawāt* and *sarāyā* focuses on the circumstances that led to these incidents rather than on the theories developed by later generations of researchers.

The reports about the life of the Prophet are a very rich source has and have been used to construct various theories and assumptions, depending on the researchers' own interpretations and their use or abuse of the sources. The challenge facing the researchers here is to distinguish between the authentic reports and the dubious and fabricated ones. Unlike their Western counterparts, Muslim scholars have developed complex and specialized methodologies for this purpose. One of the major differences between Western and Muslim scholarship on the study of Islam is their approach to the nature of the Qur'ān and the acts of the Prophet. Furthermore, based on the diverse interpretations of the hostile incidents discussed above, a

[147] Watt, *Muhammad at Medina*, p. 33.
[148] Armstrong, *Muhammad: A Biography of the Prophet*, pp. 192 f.

number of contradictory theories on the tradition of war in Islam have been developed in outsider literature, as will be shown below.

For example, in an "interpretive approach" to building a theory about the occurrences of hostilities in early Islam discussed above, Firestone explains that the emigrants had to resort to the old, pre-Islamic custom of tribal raids in order to improve their difficult economic situation. He affirms that these wars were not "holy wars" but "mundane wars", apart from the fact that those engaged in them considered themselves to be acting in accordance with God's design.[149] In his attempt to read the mind of the emigrants, Firestone imagines that their immediate problem was "whom should they raid?"[150] No indication is given of how he reaches this reading, but he replies to the question by saying that the "natural prey"[151] for the emigrants was their own kin, the tribe of Quraysh because, first, the emigrants saw that the Meccans' caravans were lucrative targets and second, and more importantly, he adds, contradicting his earlier portrayal of the Muslims as initiators of aggression, that the emigrants sought revenge because "they had been treated so abusively by their own Meccan kith and kin."[152] He also admits that Muslims "avoided physical aggression at almost any cost and suffered physical and emotional abuse as a consequence."[153] Otherwise, he imagines, the emigrants "could have decided to raid unrelated tribes, or that other schemes could have been attempted."[154] To complete this portrayal, Firestone claims that justifications were needed for these raids

[149] Firestone, *Jihād*, p. 130.
[150] Ibid., p. 131.
[151] Ibid.
[152] Ibid.
[153] Ibid., p. 129. Firestone reaffirms that Muslims "remained a weak community and suffered both verbal and physical humiliation at the hands of their enemies in Mecca. They were powerless to defend themselves. Finally, they were expelled from their Meccan home and found refuge in the settlements of Medina." See Reuven Firestone, "Jihād", in Andrew Rippin, ed., *The Blackwell Companion to the Qur'ān* (Oxford: Blackwell, 2006), p. 316.
[154] Firestone, *Jihād*, p. 131.

"perhaps"[155] in order to justify the violation of the prohibition of attacking one's kin or "perhaps, because transcendent sanction was felt needed to engage in organized violent acts of any kind."[156]

Firestone starts his discussion of the battle of Badr by remarking that it was a "victorious expedition [that] brought Muḥammad and his followers great distinction and success in the acquisition of spoils and prestige."[157] Here, he adds that the Prophet is "depicted in the Sīrā as inciting his warriors with the promise that martyrs slain in battle will enter paradise."[158] Firestone concludes that, after Badr, "according to the tradition, warring in the path of God was now required virtually without restriction, [for this reason Firestone admits that] the material following Badr will not occupy us."[159] To give some logic to this theory, he argues that this swift transition from what he calls mundane war to holy war "occurred neither linearly nor smoothly."[160] He explains that the *munāfiqūn* (hypocrites), which term he wrongly translates as "dissenters", were condemned for not engaging in the fighting at Uḥud and in other instances.[161] In other words, his point of departure is that not all the Muslims were willing to engage in war.[162]

He concludes his theory as well as his book with the following: "[these wars developed into] the total declaration of war against all groups, whether kin or not, who did not accept the truth of the hegemony of Islam."[163] However, he gives another interpretation of these wars earlier in his book, asserting that the pre-Islamic responsibility to go to war in order to protect the viability and honour of one's

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[155] Ibid.
[156] Ibid.
[157] Ibid., p. 112.
[158] Ibid., p. 114.
[159] Ibid.
[160] Ibid., p. 134.
[161] Ibid., pp. 78-83
[162] Firestone, "Jihād", p. 318.
[163] Firestone, *Jihād*, p. 134.

kinship group was replaced by the new Islamic responsibility to go to war in order to "protect the viability or honour of the new community of believers by fighting in the path of God."[164] He even sketches a third theory of what he calls holy war, and claims that these wars developed eventually to include "anyone who opposed Muḥammad and his divinely guided following".[165]

Firestone's theory is reviewed in a number of Western academic journals. It is interesting to note that he avoids direct reference to the Prophet in the development of war in Islam and seems not to link the Prophet directly to what he portrays as marauding attacks on the Meccans, unless he meant to include the Prophet among the emigrants. Nonetheless, all the sources make it clear, as Firestone himself notes, that the Prophet was the judicial and political leader of the whole community of Muslims and Jews in Medina.[166]

Firestone's serious mistake, which is commonly found in many outsider studies, is that he constructs his theories on the early wars in Islam without studying those wars. In other words, he does not substantiate his theory by referring to specific hostile incidents, explaining why and where they took place and who initiated them, and constructing his theory on that basis. In his chapter "The Sīra", he discusses only the *sariyah* of ʿAbd Allah ibn Jaḥsh and the battle of Badr. It is, indeed, disappointing that Firestone bases his theory on a biased presentation of only one battle in Islam and admits that he disregards all the other material. While the way he distorts the incidents during the Meccan period and the battle of Badr may be understandable, he ends his book without explaining his concluding idea of a declaration of total war against all mankind.

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[164] Ibid., p. 74.
[165] Ibid., p. 132.
[166] See Ibid., p. 120.

Thus, Firestone bases his whole theory on the incorrect idea that the Prophet launched marauding attacks against the Quraysh, while in fact it was Quraysh who launched a series of attacks against the Muslims in Medina, as explained above. Although no fighting took place between the Muslims and their oppressors in Mecca, Emmanuel Sivan also claims that the Prophet fought "for dominance in Arabia against the pagans, first against the city of Mecca (622-28) and then against the nomadic Arabian tribes (628-32)… in the struggle over limited resources (above all water and grazing ground), and transformed it and the warrior ethos it produced into an integral part of its creed".[167]

Firestone's idea that the *munāfiqūn* were not willing to engage in what he portrays as offensive action is misinformation. His theory on *munāfiqūn* seems to be an overdevelopment of Watt's discussion of what he calls "the Muslim opposition".[168] Firestone gives no explanation to substantiate the idea that their refusal to engage in fighting was based on a rejection of the new ethos of war. In putting forward this idea, he expresses his distrust of the sources, but still argues that "we must remain content to note that, for whatever reason, a large and powerful enough segment of the Muslim community refused, at least for an important period, to engage in fighting."[169]

Strangely enough, he admits that "the exact identity and motivations of these dissenting groups cannot be reconstructed, but their existence is clear."[170] Ironically, some of the verses he uses to construct his theory (Qur'ān 48:11, 16) speak of the *munāfiqūn* who refused to join the Prophet in his journey to perform *ʿumrah* in 6/628. Al-Wāqidī points out that their refusal to join the Prophet was not because

[167] Emmanuel Sivan, "The Holy War Tradition in Islam", *Orbis*, Vol. 42, Issue 2, Spring 1998, p. 172.
[168] Watt, *Muhammad at Medina*, pp. 180-191.
[169] Firestone, *Jihād*, p. 79.
[170] Ibid., p. 83.

they were busy, as they claimed, but because of their criticism of the Prophet for going to the Quraysh unarmed.[171] It was because of such behaviour, in addition to their occasional treason, that they were called hypocrites. As for those who were criticized for not fighting at Uḥud, it is clear that they were obliged to defend their city against the attack of the Quraysh, as stipulated in the Constitution of Medina.

In the Qur'ān, Chapter 63, *Al-Munāfiqūn* (The Hypocrites) and many other verses speak about this issue. Ibn Isḥāq devotes a considerable part of his book to the issue of the *munāfiqūn* in the early period in Medina.[172] He lists many names from various clans who hypocritically claimed to be Muslims, with a subtitle; "The Rabbis who accepted Islam hypocritically".[173] Ibn Isḥāq states that in one incident some of these hypocrites were ejected from the mosque.[174] It is worth adding here that the first few months after the Prophet's arrival in Medina witnessed theological confrontations between Jews and Muslims. Ibn Isḥāq indicates that the first hundred verses of Chapter Two of the Qur'ān, "The Cow", were revealed "in reference to these Jewish rabbis and the hypocrites of Aus and Khazraj".[175] In 9 A.H. the Prophet ordered the destruction of a new mosque built by twelve of the *munāfiqūn*.[176] So Firestone's point of departure for constructing his theory that the *munāfiqūn* were Muslims who rejected fighting because of the new ethos of offensive or holy war, is a false assumption. These wars were waged by the Quraysh on Medina and all of those labelled *munāfiqūn* were condemned because they failed to meet their obligation to defend the city as stipulated by the Constitution of Medina.

[171] Al-Wāqidī, *Al-Maghāzī*, Vol. 2, p. 72.
[172] See Ibn Isḥāq, *Al-Sīrah*, Vol. 2, pp. 97-174; Guillaume, *The Life of Muhammad*, pp. 239- 279.
[173] Guillaume, *The Life of Muhammad*, p. 246; Ibn Isḥāq, *Al-Sīrah*, Vol. 2, p. 110.
[174] Ibn Isḥāq, *Al-Sīrah*, Vol. 2, p. 111, Guillaume, *The Life of Muhammad*, pp. 246 f.
[175] Guillaume, *The Life of Muhammad*, pp. 247-297; Ibn Isḥāq, *Al-Sīrah*, Vol. 2, pp. 112-164.
[176] See Qur'ān 9:107-108

Rudolph Peters points out that Firestone, specifically in his treatment of Qur'ānic texts, "uncritically" applies a method used by Morton Smith in his 1957 PhD thesis on the Old Testament. Peters explains that "the differences in textual history between the Hebrew Bible and the Qur'ān make it difficult to transfer methods developed in one field to another…The interpretation of the Qur'ān as a historical source therefore requires a totally different approach."[177] This indicates that there is a line of thought in Western scholarship that approaches Islam with a tendency to study and interpret it through the historical and religious experiences of Judaism and Christianity. This approach has necessarily led to distorted judgements and even to the creation of readings of the history and texts of Islam that are totally different from those of the Muslims'.

Muslim and Western scholarship agree that a state of war was the normal state of relations between the various tribes in Arabia at the time of the advent of Islam. Outbreaks of war in Medina during the Prophet's lifetime have been a rich source for constructing various, and sometimes contradictory, theories on the nature and objectives of war in Islam. Watt's *Muhammad at Mecca* and *Muhammad at Medina* and their abridgement in his *Muḥammad: Prophet and Statesman* are laudable efforts in the study of the life of the Prophet,[178] because Watt bases his study of hostile incidents during the Prophet's time on the biographical material. Many Western scholars are influenced by some of Watt's ideas and some of his ideas have been further developed or reinterpreted.

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[177] Rudolph Peters, review of *Jihād: The Origin of Holy War in Islam*, by Reuven Firestone, *International Journal of Middle East Studies*, Vol. 34, No. 4, Nov. 2002, p. 740.

[178] In the words of Bonner, "Half a century ago, William Montgomery Watt wrote a two volume biography of Muhammad that has since withstood the test of time." See Bonner, *Jihad in Islamic History*, p. 43. See also Jabal Muhammad Buaben, *Image of the Prophet Muḥammad in the West: A Study of Muir, Margoliouth and Watt* (Leicester: Islamic Foundation, 1996/1417), pp. 318-320.

Although Watt's three-volume study on the life of the Prophet contains many insightful ideas, this study disagrees with some of his interpretations of the incidents, such as his idea that the Prophet's seven early expeditions "were directed against Meccan caravans."[179] It is worth adding that he explains that these expeditions "are of slight importance, in that nothing seemed to happen".[180] He even recognizes that two of these expeditions resulted in peace treaties.[181] Watt formed this opinion about the seven early expeditions by accepting the phrase in a report mentioned above in al-Wāqidī's *Al-Maghāzī* which he understands to mean that the objective of the *sariyah* of Ibn Jaḥsh was "to ambush a Meccan caravan". The present study argues that al-Wāqidī's wording here was not intended to give the meaning understood by Watt. Al-Wāqidī in fact gives another report which explains that the objective of this *sariyah* was to bring news of what the Quraysh was planning.[182] As explained above, these early expeditions aimed at introducing Islam to the tribes and making peace treaties with them, thus ensuring that they would not support the Quraysh in any attack on the Muslims.[183] A dozen or two of the three hundred Muslim men at Medina went on reconnoitring missions to find out whether the Quraysh were preparing for any attack. The number of the Muslims who went into these missions (in one mission they numbered only eight) proves that such *ghazawāt* and *sarāyā* were reconnoitring missions and obviously not raids as commonly assumed.[184] Hence, Shākir titles his discussion of these early expeditions *al-ghazawāt wa al-sarāyah al-istiṭlāʿiyyah* (reconnaissance *ghazawāt* and *sarāyā*).[185]

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[179] Watt, *Muhammad at Medina*, p. 2.
[180] Ibid.
[181] Ibid., pp. 3 f.
[182] Al-Wāqidī, *Al-Maghāzī*, Vol. 1, p. 30.
[183] See Aḥmad, *Al-Sīrah al-Nabawiyyah fī Ḍaw' al-Maṣādir al-Aṣliyyah*, pp. 326 f.
[184] Ghunaym, *Al-Jihād al-Islāmī*, pp. 24 f.; Ṣaqr, *Falsafah al-Ḥarb*, p. 73. See also Hashmi, "Islam, Sunni", p. 217.
[185] Shākir, *Al-Tārīkh al-Islāmī*, pp. 164-172.

Watt's mistaken idea of presenting these expeditions as offensive attacks has, unfortunately, been expanded upon by some theorists. Firestone develops this idea to speak of what he calls "mundane attacks" on the Quraysh and then transforms this into a theory of Muslim holy war against all mankind.[186] Armstrong accepts the idea that the Muslims resorted to the then "national sport" of *ghazw* against the caravans of the Meccans because the Meccans persecuted and expelled them from their homes. Nonetheless, concerning the spread of Islam, she explains that all the Arab tribes had either converted to Islam or joined the Muslim *ummah* as confederates, especially after the treaty of al-Ḥudaybiyah. In fact, the ninth year of the *hijrah* is called the "year of the delegations" because delegations from all over Arabia came to the Prophet declaring their acceptance of Islam.[187] This meant the collapse of the religion of the Meccans and thus the destruction of their economy and prestige position among all the Arabs. It is this, Ibn Isḥāq explains, that was the reason for which the Quraysh waged aggression against the Prophet.[188] Thus, Armstrong concludes her succinct balanced reading of the Prophet's lifetime by saying that, before the Prophet's death, "the ghastly cycle of tribal warfare, of vendetta and counter-vendetta, had ended. Single-handedly, Muhammad had brought peace into war-torn Arabia."[189] This shows the extent of the contradictions between the readings of these wars in Western scholarship. While Firestone portrays them as all-out holy wars against all mankind, Armstrong maintains that the Prophet brought peace to the already "war-torn Arabia".

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[186] See also Sivan, "The Holy War Tradition in Islam", p. 172.
[187] Ibn Isḥāq, *Al-Sīrah*, Vol. 4, p. 120; Guillaume, *The Life of Muhammad*, p. 627; Ibn Khaldūn, *Tārīkh Ibn Khaldūn*, Vol. 2, pp. 470-479; Ibn Sayyid al-Nās, *ʿUyūn al-Athar*, Vol. 2, pp. 312-344; Haykal, *The Life of Muḥammad*, pp. 456-460; Yūsuf ibn ʿAbd al-Barr, *Al-Durar fī Ikhtiṣār al-Maghāzī wa al-Siyar*, ed. Shawqī Ḍīf, 2nd ed. (Cairo: Dār al-Maʿārif, 1983), p. 153; Stewart, *Unfolding Islam*, p. 90.
[188] Ibn Isḥāq, *Al-Sīrah*, Vol. 4, p. 121; Guillaume, *The Life of Muhammad*, p. 628; Ibn Khaldūn, *Tārīkh Ibn Khaldūn*, Vol. 2, p. 470.
[189] Armstrong, *Islam: A Short History*, p. 20.

In his chapter “Foundations of Conquest”, Donner relates the rise of the Islamic state in Medina to the Prophet’s “highly successful pursuit of political power”.[190] He explains that the Prophet used many methods to establish his power in Medina and argues that the incidents that took place in Medina were the result of the Prophet’s determination to achieve political power. He believes that the Prophet set himself up as a ruler against the opposition of the three Jewish clans of Qaynuqāʿ, al-Naḍīr, and Qurayẓah and “struggle[d] to humble the Quraysh in his native city, Mecca”.[191]

However, Donner bases his theory here on two unfounded assumptions. First, the idea that the Prophet established his leadership against the opposition of the three Jewish clans is based on the reactions, rather than the actions which led to these reactions. In other words, if the Qaynuqāʿ had not fought against the Prophet and if al-Naḍīr had not attempted to assassinate the Prophet, they would not have been sent into exile. And if the Qurayẓah had not supported the Quraysh in the battle of the Ditch, its male members would not have been sentenced to death by Saʿd ibn Muʿādh. Moreover, the Prophet, from his arrival in Medina, had already become the leader of the whole community of Muslims and Jews in the city, as stipulated in the Constitution of Medina. Second, the idea that the Prophet “struggled to humble Quraysh” seems also to be a development of Watt’s mistaken understanding of the seven early expeditions. The biographical material proves that the Quraysh launched attacks on the Muslims in Medina. Moreover, the treaty of al-Ḥudaybiyah substantiates the fact that the Prophet accepted the inferior position stipulated by the Quraysh negotiators in this treaty. It is worth adding that the Prophet accepted the

[190] Fred McGraw Donner, *The Early Islamic Conquests* (Princeton: Princeton University Press, 1981), p. 62.
[191] Ibid.

unfair and arbitrary articles of the treaty, despite the disagreement of his Companions.

Thus, there are two main, unfounded, contradictory, speculative interpretations[192] of the outbreaks of hostilities in this period: while Firestone gives a holy-war-like interpretation of the Prophet's wars, Donner advocates a secular interpretation, portraying the Prophet as a "genius politician and strategist"[193] who was ambitious for political power. Nonetheless, Bruce B. Lawrence maintains: "The war Muhammad waged against Mecca was not a struggle for prestige or wealth, but for the survival of God's Word and his own person."[194]

But the present study argues that the following important questions should be addressed in any attempt to theorize on the tradition of war in Islam: would there have been any outbreaks of hostility in early Islam if the Prophet and the Muslims had not been persecuted and had been permitted to practise their new religion freely in Mecca? And would there have been any war in Medina if Abū Jahl had not forced the Quraysh to go to war at Badr, or if the three Jewish clans had abided by the Constitution of Medina and not attempted to assassinate the Prophet or supported the Quraysh in the battle of the Ditch? Thus, Watt remarks here that "it is interesting to speculate on what would have happened had the Jews come to terms with Muḥammad instead of opposing him."[195] This study argues that, as concluded by Ibn Taymiyyah (d. 728/1328), the hostile actions referred to above were not initiated by

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[192] To show the highly speculative nature of the interpretations of these period, Donner concludes his "Muḥammad's Political Consolidation" with the following: "The interpretations proposed here cannot be considered decisively proven, of course, and in view of the state of our sources they may remain forever beyond decisive proof or disproof. " See Ibid., p. 247.
[193] Donner, *The Early Islamic Conquests*, p. 69; Donner, "Muḥammad's Political Consolidation", pp. 229-247.
[194] Lawrence, *The Qur'ān*, p. 42.
[195] Watt, *Muhammad at Medina*, p. 219.

the Prophet or motivated by Islamic teachings to engage in offensive attacks against non-Muslims because of their unbelief in Islam.[196]

### 1.8 Conclusion

This study finds that the attempts of the early biographers to refer to all the Prophet's travels and engagements with others as *ghazawāt* or *maghāzī* and expeditions sent by him as *siyar*, without differentiating between the preaching and fighting missions, have caused considerable misunderstanding about the tradition of war in Islam, although they agree that fighting took place in nine of the Prophet's twenty-seven *ghazawāt*, namely, Badr, Uḥud, The Ditch, Qurayẓah, al-Musṭaliq, Khaybar, fatḥ Mecca, Ḥunayn, and al-Ṭā'if.

As pointed out above, Badr, Uḥud, and the Ditch were defensive engagements against offensive attacks on the Muslims in Badr and Medina by the Quraysh and a number of other clans who joined in the attack at the battle of the Ditch. The exiled Jews of Naḍīr were behind the mobilization of several other clans in this attack and offered as an inducement "half the date harvest of Khaybar … to B. Ghaṭafān if they would join in the attack."[197] Qurayẓah should not be considered an act of war as it was the implementation of the arbitration against the traitors at the battle of the Ditch. Al-Musṭaliq was a response to an attack already in progress. As for Khaybar, it is significant that, first, Khaybar numbered ten thousand while the Muslims numbered about three thousand. Second, it ended in an agreement that Khaybar were to pay half the produce of their lands. Watt explains that the reason for this incident was Khaybar's "use of their wealth to induce the neighbouring Arabs

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[196] See Ibn Taymiyyah, *Qāʿidah Mukhtaṣarah fī Qitāl al-Kuffār*, pp. 96, 134.

[197] Watt, *Muhammad at Medina*, p. 36; see also Darwazah, *Al-Jihād fī Sabīl Allah*, p. 242; Stewart, *Unfolding Islam*, p. 84.

and especially the strong tribe of Ghaṭafān to join them against the Muslims."[198] Hence, the aim of the Prophet's march to Khaybar was to put an end to their hostility after they had violated the Constitution of Medina. Accepting Islam or making this payment signifies peaceful coexistence and recognition of the authority of the state system stipulated in the Constitution of Medina. As for Fatḥ Mecca, as stated above, the Prophet's march to Mecca with at least ten thousand men from the Arab tribes, was a successful, popular, bloodless attempt to take control of his home city of Mecca after eight years in exile. The Prophet confirmed to the huge crowd accompanying him that their march was a peaceful one and no fighting was to take place and no fighting did in fact ensue between the two parties, although Khālid ibn al-Walīd fought in self-defence when arrows were shot at him as he was destroying an idol. Ḥunayn and al-Ṭā'if are two incidents of fighting with the clans of Hawāzin and Thaqīf that took place when they marched to Ḥunayn to fight the Prophet after he took control in Mecca.

This study thus finds that the Muslims' engagements in all these hostilities during the Prophet's lifetime were defensive.[199] Their occurrence was the result of

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[198] Watt, *Muhammad at Medina*, pp. 217 f.

[199] See, for example, Ibn Taymiyyah, *Qāʿidah Mukhtaṣarah fī Qitāl al-Kuffār*, pp. 96, 134; Muḥammad ibn Abī Bakr ibn Qayyim al-Jawziyyah, *Hidayah al-Ḥayārā fī Ajwibah al-Yahūd wa al-Naṣārā*, 4th ed., ed. Aḥmad Ḥijāzī al-Saqqā (Cairo: Al-Maktabah al-Qayyimah, 1986-7/1407), pp. 137 f.; Aḥmad Muṣṭafā al-Marāghī, *Tafsīr al-Marāghī* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1946/1365), Vol. 10, p. 92; Sobhi Mahmassani, *Al-Qānūn wa al-ʿAlāqāt al-Dawliyyah fī al-Islām* (Beirut: Dār al-ʿIlm lil-Malāyīn, 1972/1392), p. 177; Wahbah al-Zuḥaylī, "Majālāt al-ʿAlāqāt al-Dawliyyah fī al-Islām", in Fārūq Ḥamādah, ed., *Al-Tashrīʿ al-Dawlī fī al-Islām*, Nadawāt wa Munāẓarāt, No. 70 (Rabat: Kulliyyah al-Ādāb wa al-ʿUlūm al-Insāniyyah, 1997), p. 199; al-Sayyid Sābiq, *Fiqh al-Sunnah* (Cairo: Al-Fatḥ lil-Iʿlām al-ʿArabī, n.d.), Vol. 3, pp. 18 f.; Muḥammad al-Ṣādiq ʿAfīfī, *Al-Mujtamaʿ al-Islāmī wa al-ʿAlāqāt al-Dawliyyah* (Cairo: Mu'assasah al-Khānjī, 1980), p. 148; al-Ghunaimi, *Qānūn al-Salām fī al-Islām*, p. 59; Ghunaym, *Al-Jihād al-Islāmī*, pp. 32 f.; Ṭabliyyah, *Al-Islām wa Ḥuqūq al-Insān*, p. 72; ʿUmar Aḥmad al-Firjānī, *Uṣūl al-ʿAlāqāt al-Dawliyyah fī al-Islām*, 2nd ed. (Tripoli, Libya: Dār Iqra', 1988/1397), pp. 77, 82 f.; al-Shaykh al-Rikābī, *Al-Jihād fī al-Islām: Dirāsah Mawḍūʿyyah Taḥlīlyyah Tabḥath bi-al-Dalīl al-ʿIlmī al-Fiqhī ʿan al-Jihād wa ʿAnāṣirih fī al-Tanzīl wa al-Sunnah* (Damascus: Dār al-Fikr, 1997/1418), pp. 125 f.; ʿUthmān al-Amīn al-Amīn, "Mawqif al-Islām min Ẓāhirah al-Irhāb", *Islam and the 21st Century*, Researches and Facts, the Tenth General Conference of the Supreme Council for Islamic Affairs (Cairo: Supreme Council for Islamic Affairs, 1999/1420), p. 311; C.G. Weeramantry, *Islamic Jurisprudence: An International Perspective* (Basingstoke: Macmillan, 1988), p. 147; Stewart, *Unfolding Islam*, p. 92; Alsumaih, "The Sunni Concept of Jihad", pp. 41, 271, 276. Rudolph Peters indicates that modern Muslim writers "show that

normal developments of events arising from the political and cultural systems in place in the war-torn Arabia of the time. Shaykh Alī Jumʿah, the current Muftī of Egypt (2003-present), adds that all these incidents occurred between the Prophet and his relatives, namely, the various tribes of the clan of Muḍar, and the Jewish clans who allied with Quraysh.[200] He suggests that, as was natural for the Arabs of the time, Muḍar fought these battles because of the leadership and authority the Prophet was gaining at the time. In fact, the spread of Islam and the growth of the Prophet's leadership were undermining their religion and thus their economy, power and prestige in Arabia. This explains Abū Jahl's motive, quoted above, for forcing the Meccans to fight the Prophet in the first battle in Islam, the battle of Badr, and therefore supports Watt's reading that Abū Jahl wanted to eliminate the Prophet for ever. Their defeat at Badr necessitated revenge to restore their leadership, and the subsequent occurrences of fighting that ensued as a result. It was for the same reason – to strengthen the Meccans' leadership - that the Meccans dictated arbitrary articles in the negotiations of the armistice of al-Ḥudaybiyah intended to show the inferior position of the Prophet and requiring him to return to Medina without entering Mecca to perform *ʿumrah* that year.

Moreover, the cases of the Jews of Banū Qaynuqāʿ who fought alongside the Prophet after Badr,[201] the Jewish Rabbi who fought and called upon his fellow Jews to fight alongside the Prophet against the attack by the Quraysh at the battle of Uḥud,

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all military campaigns, raids and expeditions of Mohammed and the first Caliphs were purely defensive". See Rudolph Peters, "Djihad: War of Aggression or Defense?", in Albert Dietrich, ed., *Akten des VII. Kongresses Für Arabistik und Islamwissenschaft* (Göttingen, Aug. 1974) (Göttingen: Vandenhoeck & Ruprecht, 1976), p. 286; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, pp. 339-364, 380.

[200] ʿAlī Jumʿah, "Al-Jihād fī al-Islām: Dirāsah Tahlīliyyah", *The Truth about Islam in a Changing World*, Researches and Proceedings, the Fourteenth General Conference of the Supreme Council for Islamic Affairs (Cairo: Supreme Council for Islamic Affairs, 2004/1425), pp. 710-716.

[201] See, for example, Muḥammad ibn Idrīs al-Shāfiʿī, *Al-Umm*, 2nd ed. (Beirut: Dār al-Maʿrifah, [1973]/1393), Vol. 4, p. 261; Muḥyī al-Dīn ibn Sharaf al-Nawawī, *Al-Majmūʿ: Sharḥ al-Muhadhdhab*, ed. Maḥmūd Maṭrajī (Beirut: Dār al-Fikr, 2000), Vol. 21, p. 37; al-Māwardī, *Al-Ḥāwī*, Vol. 14, p. 130; al-Ḥifnī, *Mawsūʿah al-Qur'ān*, Vol. 2, p 1905.

the group of Jews who fought with the Prophet and received a share of the war spoils,[202] and the many idolaters who fought with the Prophet at Ḥunayn and al-Ṭā'if, are all examples that mitigate against the idea that these were wars fought for the spread of a certain religion. On the basis of these incidents, most of the classical Muslim jurists advocated that it was permissible for polytheists to fight alongside the Muslims against the *dār al-ḥarb*.[203] Furthermore, on the basis of the above incidents and the jurists' consequent agreement on the permissibility of non-Muslims' fighting alongside a Muslim army, contemporary Muslim scholars have strongly advocated the Islamic permissibility of seeking the support of the non-Muslim forces for the liberation of Kuwait from the Iraqi *ghazw* (invasion) of August 1990-February 1991.[204] *The Islamic Fiqh Council Journal*, affiliated to the Saudi-based Muslim

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[202] See, for example, Muḥammad ibn ʿAbd al-Wāḥid ibn Aḥmad, *Al-Aḥādīth al-Mukhtārah*, ed. ʿAbd al-Malik ibn ʿAbd Allah ibn Duhaysh (Mecca: Maktabah al-Nahḍah al-Ḥadīthah, 1990/1410), Vol. 7, p. 189; Muḥammad ibn Yūsuf al-Ṣāliḥī, *Subul al-Hudā wa al-Rashād fī Sīrah Khayr al-ʿIbād*, ed. ʿĀdil Aḥmad ʿAbd al-Mawjūd and ʿAlī Muḥammad Muʿawwaḍ (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1993-4/1414), Vol. 9, p. 121; Saʿīd ibn Manṣūr, *Sunan Saʿīd Ibn Manṣūr*, ed. Ḥabīb al-Raḥman al-Aʿẓamī (India: Al-Dār al-Salafiyyah, 1982/1403), Vol. 2, p. 331; Ibrāhīm ibn Muḥammad ibn ʿAbd Allah ibn Mufliḥ, *Al-Mubdiʿ fī Sharḥ al-Muqniʿ* (Beirut: Al-Maktab al-Islāmī, 1979-80/1400), Vol. 3, p. 336; Muḥammad ibn ʿAlī ibn Muḥammad al-Shawkānī, *Nayl al-Awṭār: Min Aḥādīth Sayyid al-Khyār Sharḥ Muntaqā al-Akhbār* (Beirut: Dār al-Jīl, 1973), Vol. 8, pp. 43 f. See also, for Jews and idolaters fighting alongside the Prophet against the Muslims' enemies, Muwaffaq al-Dīn ʿAbd Allah ibn Aḥmad ibn Qudāmah, *Al-Mughnī: Fī Fiqh al-Imām Aḥmad Ibn Ḥanbal al-Shaybānī* (Beirut: Dār al-Fikr, 1984-5/1405), Vol. 9, p. 207; Muḥammad al-Ghazālī, *Al-Wajīz fī Fiqh al-Imām al-Shāfiʿī*, ed. ʿAlī Muʿawwaḍ and ʿĀdil ʿAbd al-Mawjūd (Beirut: Dār al-Arqam ibn Abī al-Arqam, 1997/1418), Vol. 2, p. 190; Muḥammad al-Ghazālī, *Al-Waṣīt fī al-Madhhab*, ed. Aḥmad Maḥmūd Ibrāhīm and Muḥammad Muḥammad Tāmir (Cairo: Dār al-Salām, 1997/1417), Vol. 7, p. 16; ʿUthmān, "Iʿtidā' Ṣaddām ʿalā al-Kuwayt Munkar", p. 183; Mannāʿ al-Qaṭṭān, "Al-Istiʿānah bi-ghayr al-Muslimīn", *The Islamic Fiqh Council Journal*, Issue No. 5, [1991/1411], p. 201.

[203] See, for example, Muḥammad ibn al-Ḥasan al-Shaybānī, *Al-Siyar*, ed. Majid Khadduri (Beirut: Al-Dār al-Muttaḥidah, 1975), p. 249; Muḥyī al-Dīn ibn Sharaf al-Nawawī, *Al-Majmūʿ: Sharḥ al-Muhadhdhab*, ed. Maḥmūd Maṭrajī (Beirut: Dār al-Fikr, 2000), Vol. 21, pp. 37 f.; Muḥyī al-Dīn ibn Sharaf al-Nawawī, *Rawḍah al-Ṭālibīn wa ʿUmdah al-Muftīn*, 2nd ed. (Beirut: Al-Maktab al-Islāmī, 1984-5/1405), Vol. 10, p. 239; Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 207; al-Shawkānī, *Nayl al-Awṭār*, Vol. 8, pp. 42-45; Muḥammad Amīn ibn ʿUmar ibn ʿĀbidīn, *Ḥāshiyah Radd al-Muḥtār ʿalā al-Durr al-Mukhtār: Sharḥ Tanwīr al-Abṣār Fiqh Abū Ḥanīfah* (Beirut: Dār al-Fikr, 2000/1421), Vol. 4, p. 148; Muḥammad ibn Yūsuf ibn Abī al-Qāsim al-ʿAbdarī, *Al-Tāj wa al-Iklīl: Sharḥ Mukhtaṣar Khalīl*, 2nd ed. (Beirut: Dār al-Fikr, 1977-8/1398), Vol. 3, p. 353; ʿAbd al-Laṭīf ʿĀmir, *Aḥkām al-Asrā wa al-Sabāyā fī al-Ḥurūb al-Islāmiyyah* (Cairo: Dār al-Kitāb al-Miṣrī; Beirut: Dār al-Kitāb al-Lubnānī, 1986/1406), pp. 57-59; Yūsuf al-Qaraḍāwī, *Al-Ḥalāl wa al-Ḥarām fī al-Islām*, 22nd ed. (Cairo: Maktabah Wahbah, 1997/1418), pp. 295 f.; ʿAbbās Shūmān, *Al-ʿAlāqāt al-Dawliyyah fī al-Sharīʿah al-Islāmiyyah*, Silsilah al-Dirāsat al-Fiqhīyyah, 1 (Cairo: Al-Dār al-Thaqāfiyyah lil-Nashr, 1999/1419), pp. 57 f.; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, pp. 703-711.

[204] See Muḥammad Sayyid Ṭanṭāwī, "Al-Ḥukm al-Sharʿī fī Aḥdāth al-Khalīj", *The Islamic Fiqh Council Journal*, Issue No. 5, [1991/1411], pp. 76-83; Hāshim, "Ma'sāh al-Ghazw al-ʿIrāqī", pp. 110-

World League, devoted its fifth issue to the discussion of this question and, more importantly, to justifying the Islamic permissibility of hosting American forces in Saudi Arabia and other Gulf countries.[205] This fifth issue also includes statements to this effect from important Islamic institutions such as al-Azhar al-Sharīf and Dār al-Iftā' of Egypt, as well as the Committee of the Senior Saudi Scholars. Interestingly, these Muslim scholars are advocating here the permissibility of military support from non-Muslim forces in a war against another Muslim country.

Thus, none of the incidents of war studied in this chapter could be described as "holy war" in the sense of a war waged to propagate a religion or because the opponents held different beliefs. However, the confusion about the tradition of war in Islam arises from the fact that the decision to join in these defensive just wars was given religious justification. In the next chapter, this confusion in the exegetes' interpretations of the Qur'ānic justifications for engaging in fighting in the incidents discussed here will become obvious. It is worth recalling here that the whole struggle between the Meccans and the Muslims arose after the Muslim minority were persecuted and forced to flee Mecca because of their new religion.

Concerning the extent of the use of force in the wars studied here, according to Muḥammad ʿImārah, the number of fatalities in all these incidents totals 384 (181 Muslims and 203 among their enemies),[206] while according to Ahmed Shalabī it

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115; ʿUthmān, "Iʿtidā' Ṣaddām ʿalā al-Kuwayt Munkar", p. 181; al-Qaṭṭān, "Al-Istiʿānah bi-ghayr al-Muslimīn", pp. 195-203; Muḥammad ibn ʿAbd Allah al-Sabīl, "Ḥukm al-Istiʿānah bi-ghayr al-Muslimīn fī al-Jihād", *The Islamic Fiqh Council Journal*, Issue No. 5, [1991/1411], pp. 205-223; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, pp. 712-721.

[205] See, for example, Ṭanṭāwī, "Al-Ḥukm al-Sharʿī fī Aḥdāth al-Khalīj", pp. 76-83; Hāshim, "Ma'sāh al-Ghazw al-ʿIrāqī", pp. 110-115; al-Qaṭṭān, "Al-Istiʿānah bi-ghayr al-Muslimīn", pp. 198, 202. See also Esposito, *Unholy War*, p. 34; YvonneYazbeck Haddad, "Operation Desert Shield/ Desert Storm: The Islamist Perspective", in Bhyllis Bennis and Michel Moushabeck, eds., *Beyond the Storm: A Gulf Crisis Reader* (New York: Olive Branch Press, 1991), pp. 251-253.

[206] Muḥammad ʿImārah, *Al-Islām wa al-Ākhar: man Yaʿtarif biman? Wa man Yunkir man?*, 3rd ed. (Cairo: Maktabah al-Shurūq al-Dawliyyah, 2002), p. 65. ʿImārah depends on Ibn ʿAbd al-Barr's *Al-Durar*.

totals 251 (139 Muslims and 112 among their enemies).[207] However, the differing numbers of fatalities given in the biographical material discussed in this study estimate that the total number in all the incidents is between a minimum of 367 (170 Muslims and 197 among their enemies) and a maximum of 514 (222 Muslims and 292 among their enemies). In fact, there is no way to ascertain the accuracy of these numbers, so researchers have to choose one of the biographers' accounts. However, ʿAbd al-Ṣabūr Marzūq, the Secretary General of the Supreme Council for Islamic Affairs in Egypt, affirms that the number of fatalities, including both Muslims and their enemies, is less than four hundred.[208] These figures indicate the degree of force used in these incidents and the insignificance of the disagreement over the numbers caused by referring to different biographical material. Those executed in *ghazwah* Banū Qurayẓah are not included in these figures because they were sentenced by Saʿd ibn Muʿādh for their treason and are therefore not counted among the war dead.

The Prophet's expeditions, accompanied by Muslims, to the nomadic tribes in such an insecure region, whether to preach Islam or to make pacts of non-aggression with the tribes or to engage in defensive actions, were efforts that they hoped would be rewarded by God and can all be considered as *one* form of the Islamic concept of jihād. Muslim deaths in these activities are considered by Muslims as acts of martyrdom.

The Qur'ānic texts and the sayings of the Prophet calling upon Muslims to join in these defensive wars and extolling the reward for those who took part in them have been misrepresented by some as Islamic textual justifications for holy war to be initiated against non-Muslims. Unfortunately, the study of jihād in outsider literature

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[207] Ahmed Shalabī, *Al-Islām wa al-Qitāl* (Cairo: Al-Hay'ah al-ʿĀmmah lil-Kitāb), p. 12, quoted in Jumʿah, "Al-Jihād fī al-Islām", p. 716.
[208] ʿAbd al-Ṣabūr Marzūq, "Al-Islām wa al-Jihād", *Tolerance in the Islamic Civilization*, Researches and Facts, the Sixteenth General Conference of the Supreme Council for Islamic Affairs (Cairo: Supreme Council for Islamic Affairs, 2004/1425), p. 799.

has been limited to this distorted reading of such texts, which creates a totally different impression according to which Muslims are transformed from fighters in a just and defensive war into initiators of offensive holy war. In other words, these texts have been introduced as the Islamic justification for the initiation of the wars that took place during the Prophet’s lifetime, and the tradition of war in Islam in general, and not with a view to clarifying the diverse reasons for these incidents, as detailed above. Any study of these Qur’ānic texts and prophetic sayings on jihād that does not take into account whether they address a defensive or offensive, or a just or unjust war, will reach erroneous conclusions on the tradition of war in Islam.

# CHAPTER TWO

# THE JUSTIFICATIONS OF WAR IN THE QUR'ĀN

## 2.1 Introduction

A number of Qur'ānic verses address the relationship between the Muslims and their enemies during both the Meccan and Medinan periods discussed in Chapter One. In the Meccan period, over one-hundred-and-fourteen verses command Muslims to forgive their persecutors and be patient in the face of the religious oppression and execution of some of their fellows. In the Medinan period, however, certain verses give the Muslims permission to defend themselves in the face of aggression from the Meccans. In several of the Medinan chapters of the Qur'ān, many verses address the Muslims' struggle with their enemies and some of these verses command the Muslims to fight the enemy.

This chapter considers the Qur'ānic texts that address the issue of war. It discusses the interpretations of these texts in some of the most influential classical and modern Qur'ān exegeses, specifically the exegeses of al-Ṭabarī (d. 310/923), al-Qurṭubī (d. 671/1272), Rashīd Riḍā (1863-1935) and Sayyid Quṭb (1906-1966). The exegetes' interpretations reflect their understanding of the nature of the conflict between the Muslims and their enemies. More importantly, these interpretations provide the basis of the *jus ad bellum* (the justifications for resort to war) in the tradition of war formulated by the Muslim jurists, as shown in Chapter Three. Therefore, the aim of the present chapter is to discover the ways in which the Qur'ān justifies warfare and to investigate whether the Qur'ān sanctions offensive war in order to propagate Islam.

Muslim scholars have developed a number of exegetical disciplines for the study of the Qur'ān, some of which have crucially shaped Muslim understandings of

the Qur’ānic position on war. Using these exegetical disciplines and in the light of their diverse understandings of the Qur’ānic position, Muslim scholars, specifically the jurists, have formed the Islamic laws regulating the relationship of Muslims with others.

However, Fred McGraw Donner concludes that “We [Western scholars] are not in a position to catalog unequivocably *the main elements contributing to the way* [emphasis added] Muslims thought about war and its limitations…The reason for this is mainly a practical one: too little preliminary work on a vast subject.”[1] Moreover, Andrew Rippin notes that the science of Qur’ān exegesis “still remains a vast, virtually untapped field of investigation [in Western scholarship… because unfortunately] Orientalists continue to gloss over its importance as a historical record of the Muslim community, as revealed in comments that declare the material to be ‘dull and pettifogging’ and the like.”[2] These statements succinctly diagnose some of the problems that arise in the study of the Islamic tradition of war in outsider literature. Despite the importance of the subject and the vast literature on it, many areas and methodologies that contributed to the development of the Islamic law of war still remain largely under-explored. That is to say, quoting certain Qur’ānic phrases or verses or even an exegete’s interpretation of such phrases or verses, or worse – simply depending on translations of the Qur’ān, to explicate the Qur’ānic position on war, merely adds to the confusion in the area. But to find out both classical and contemporary Muslim understandings of the Qur’ānic position on war,

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[1] Fred McGraw Donner, “The Sources of Islamic Conceptions of War”, in John Kelsay and James Turner Johnson, eds., *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions* (Westport, Conn.: Greenwood Press, 1991), pp. 56 f.

[2] Andrew Rippin, ed., *Approaches to the History of the Interpretation of the Qur’ān* (Oxford: Clarendon, 1988), Acknowledgements, p. V. Referring generally to the study of the Qur’ān, W. Montgomery Watt concludes that “The Qur’ān has been studied and meditated on for about fourteen centuries, and much has been achieved. Yet… there is need for still further study of the Qur’ān and study along new lines; and this must be undertaken by both Muslims and non-Muslims.” W. Montgomery Watt, *Bell’s Introduction to the Qur’ān*, Islamic Surveys 8 (Edinburgh: Edinburgh University Press, reprint 1997), p. 186.

the best approach is to examine the exegetical disciplines that the exegetes themselves apply.

It is important to note here that it is generally characteristic of Islamic scholarship that Muslim scholars, whether exegetes, jurists or otherwise, were all individual researchers who worked independently without any formal relationship with state authorities, except when scholars accepted the position of *qāḍī* (judge). Moreover, as H.A.R. Gibb notes, they "were hesitant or unwilling to become involved in the practical affairs of government."[3] Their works present their individual intellectual efforts to conceive an Islamic framework for relating to others in times of peace and war. Their frameworks derive from their readings of the injunctions found in the Qur'ān and the Sunnah (tradition) of the Prophet. It is undeniable, however, that these scholars were influenced, throughout Islamic history, by the socio-political conditions of their times.[4]

## 2.2 The Text and Context of the Qur'ān

It goes without saying that the Qur'ānic verses on the issue of war must be read in their socio-political and linguistic contexts. More importantly, they must be understood in the context of the specific incidents they address.[5] As Mustansir Mir rightly points out, "a study of the Qur'anic view of war will have to take into account both the Qur'anic text and Muhammad's conduct of war."[6] It is therefore a major error to study these Qur'ānic verses without, or, equally misleadingly – as this study

[3] H.A.R. Gibb, "Religion and Politics in Christianity and Islam", in J. Harris Proctor, ed., *Islam and International Relations* (London: Pall Mall Press, 1965), p. 10.
[4] Abdulaziz A. Sachedina, "The Development of *Jihad* in Islamic Revelation and History", in James Turner Johnson and John Kelsay, eds., *Cross, Crescent, and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (New York: Greenwood Press, 1990), pp. 35 f.
[5] Asma Afsaruddin, "Views of *Jihad* throughout History", *Religion Compass*, Vol. 1, Issue 1, 2007, p. 165.
[6] Mustansir Mir, "Islam, Qur'anic", *Encyclopedia of Religion and War*, ed., Gabriel Palmer-Fernandez (New York: Routledge, 2004), p. 207.

argues – *before*, determining their context. Studying the Qur'ānic verses on war requires, first, deciphering the rules of Qur'ānic textual discourse by defining the meaning of the words describing the warring parties, i.e., Muslims versus their enemies, the Meccan *mushrikūn*/*kuffār* (Meccan polytheists/unbelievers), *munāfiqūn* (the hypocrites, the Medinans who outwardly claimed to be Muslims while actively supporting the Muslims' enemies) and *ahl al-kitāb* (lit. family of the scripture, generally translated as People of the Book) and, second, reconstructing the situation in which the parties involved went to war, including deciding the reasons and justifications for the initiation of a particular act of war and also who initiated it.

A problem of war studies is that any disagreement in reconstructing the situation in which war arises leads to totally different descriptions of the same incidents. For example, what some see as an offensive action may be seen by others as a defensive action, the aggressor in the eyes of some may be the victim in the view of others, and diverse judgements on what is justifiable will arise. However, if agreement is reached on the reconstruction of the situation, it should be possible, at least theoretically, to negotiate or disagree on what is just and what is not or who was the aggressor and who was not. The current state of the study of war explored in the present research is full of contradictory readings of the context of the incidents of war in the insider/Islamic and the outsider literatures. Consequently, there are widely differing readings of the same Qur'ānic texts addressing these incidents.

On the one hand, the previous chapter shows that the battles of Badr, Uḥud, the Ditch, Khaybar, Ḥunayn and al-Ṭā'if were defensive and just wars. The first three, one of which, the Ditch, involved a number of Jewish tribes, were launched by the Meccans on the Muslims in Medina. The march to Khaybar was intended to put an end to its inhabitants' hostility after they had fought in the battle of the Ditch. The

Ḥunayn and al-Ṭā'if incidents were initiated by the Hawāzin and Thaqīf tribes. With regard to the Tabūk incident, although no encounter took place, the Muslims marched as a result of a rumour circulated by Syrian traders about a Byzantine army camping in Tabūk on its way to make war upon the Muslims in Medina. Reading the context in this way, Muslims throughout history have seen the Muslims involved in these incidents as the victims of their enemies' aggression.

On the other hand, these incidents are generally portrayed in outsider literature either as holy wars launched by the Prophet against non-Muslims, or as military and strategic operations to "master", "dominate", or "conquer" the Ḥijāz.[7] Some even argue that the Prophet was acting according to the dictates of an apocalyptic interpretation which made him attempt to "stamp out *kufr* [unbelief]…wherever it appeared".[8] In these readings, researchers speak of the Prophet as the only one responsible for these events. David Cook, for example, thinks that the Prophet launched campaigns during the last nine years of his life in order to conquer territories. He concludes that the aim in the battles of Badr, Uḥud, the Ditch, Mecca, and Ḥunayn was to dominate Medina, Mecca and al-Ṭā'if.[9] This interpretation is an example of the construction of a context for these incidents wholly different from that traditionally accepted by Muslims, though, strangely enough, Cook does not discuss these "campaigns" per se. Furthermore, Cook here even constructs a contrary geographical context for these incidents, because the first three so-called "campaigns" were in fact offensive attacks launched against the Muslims in and around Medina, their town. He omits to mention that, after his arrival in Medina, the Prophet was made the leader of the community in Medina by the

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[7] See David Cook, *Understanding Jihad* (Los Angeles: University of California Press, 2005), p. 6; Reuven Firestone, "Disparity and Resolution in the Qur'ānic Teachings on War: A Reevaluation of a Traditional Problem", *Journal of Near Eastern Studies*, Vol. 56, No. 1, Jan. 1997, p. 19.

[8] Donner, "The Sources of Islamic Conception of War", pp. 47 f.

[9] Cook, *Understanding Jihad*, p. 6.

Constitution of Medina. Given this context, it is inconceivable that the Prophet could have "conquered" Medina.

Another example of creating a different context is Firestone's designation of the Muslims' enemies as the Muslims' "detractors"[10] or "nonbelievers".[11] The use of the words "detractors" and "nonbelievers" here indicates that the Muslims went to war against those who were merely critical of Islam, thus implying that Muslims launched holy wars against those who did not accept Islam. In fact these enemies were physically hostile and aggressive as shown above.

### 2.2.1 Speech-Act Theory

In his article "Understanding the Qur'ān in Text and Context", Richard C. Martin discusses a new approach to the study of the Qur'ān, one aspect of which is the "speech-act theory". As explained by Mary Louise Pratt, a speech-act can consists of two or three things. First, a *locutionary act* is the act of making a recognizable utterance. Second, an *illocutionary act* is the message conveyed in the *locutionary act* such as "ordering", "promising", "rewarding", "warning", etc. Third, a *perlocutionary act* refers to the result which may be effected on the addressee by the *illocutionary act*. For example, as a result of "ordering", the addressee may obey, or by "warning", the addressee may be frightened and so on.[12]

It appears that this theory has not been applied to the study of the Qur'ānic verses on war, though it could be helpful to look for the *perlocutionary acts* of these Qur'ānic verses on their addressees in the period limited to this study. Specifically, it

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[10] Reuven Firestone, *Jihād: The Origin of Holy War in Islam* (New York: Oxford University Press, 1999), pp. 53, 67, 69; Firestone, "Disparity and Resolution in the Qur'ānic Teachings on War", pp. 2, 6, 18, 19.
[11] Reuven Firestone, "Jihād", in Andrew Rippin, ed., *The Blackwell Companion to the Qur'ān* (Oxford: Blackwell, 2006), p. 318.
[12] Mary Louise Pratt, *Toward a Speech Act Theory of Literary Discourse* (Bloomington: Indiana University Press, 1977), pp. 81 f.; Richard C. Martin, "Understanding the Qur'ān in Text and Context", *History of Religions*, Vol. 21, No. 4, May 1982, p. 365.

could be helpful for understanding the Islamic position on war, particularly if a war were launched by the Muslim addressees as the *perlocutionary act* of a certain Qur’ānic text. An attempt is made below to apply this theory whenever possible, with the aim of better understanding the Qur’ānic verses studied in this chapter.

### 2.2.2 Others in the Eyes of Muslims

The word “Islam” means submission and obedience to God, as well as peace. The word “Muslim” denotes a follower of and a believer in the religion of Islam. Thus Muslim identity is characterized by a religious belief. To become a Muslim, a person needs to utter the formula of belief in Islam: “There is no God but God and Muḥammad is the messenger of God.”[13] Thus, a Muslim is one who submits to, and obeys, God. In this sense, earlier prophets, such as Abraham, Ishmael, Isaac, Jacob, Moses and Jesus, are also referred to in the Qur’ān as Muslims.[14] Thus, Jews, Christians, Sabaeans and Zoroastrians share with Muslims at least their belief in, and submission to, God. They are referred to in Islamic discourse as *ahl al-kitāb*, People of the Book. Therefore, contrary to what Martin claims,[15] Islam treats specifically Judaism and Christianity “not as ‘other religions’ but as itself”. Ismail R. al-Faruqi confirms this.[16]

The Qur’ān addresses Muslims as *al-muslimūn* (“Muslims”, “those who submit”) or *al-mu'minūn* (“believers”) and refers to their enemies throughout the

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[13] See ʿAbd al-Karīm Zīdān, *Aḥkām al-Dhimmiyyn wa al-Musta’minīn fī Dār al-Islām* (Beirut: Mu’assasah al-Risālah; Baghdad: Maktabah al-Quds, 1982/1402), p. 10.

[14] Qur’ān 2:128-140. See Naṣr Farīd Wāṣil, “Al-Islām Dīn Salām: Mafhūm al-Ḥarb wa al-Salām fī al-Islām”, *Islam and the 21st Century*, Researches and Facts, the Tenth General Conference of the Supreme Council for Islamic Affairs (Cairo: Supreme Council for Islamic Affairs, 1999/1420), pp. 267-269.

[15] Richard C. Martin, “The Religious Foundations of War, Peace, and Statecraft in Islam”, in John Kelsay and James Turner Johnson, eds., *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions* (Westport, Conn.: Greenwood Press, 1991), p. 98.

[16] Ismail R. al-Faruqi, “Islam and Other Faiths: The World’s Need for Humane Universalism”, in Altaf Gauhar, ed., *The Challenge of Islam* (London: Islamic Council of Europe, 1978), p. 108.

period of the revelation of the Qur'ān as *mushrikūn* ("polytheists"), *kuffār* ("unbelievers"), *munāfiqūn* ("hypocrites"), and *ahl al-kitāb* ("People of the Book"),[17] all of which terms have religious connotations. Reading the Qur'ānic texts that discuss fighting against these religious groups without deciphering the contextual meanings of these classifications leads to the misjudgement of the nature of the conflicts the texts refer to. In other words, the Qur'ānic justifications for fighting against the Muslims' enemies who were given these various religious descriptions can be mistakenly understood to be based on their religious identity alone, as is in fact assumed by many researchers.

The context of these Qur'ānic verses, as discussed in the biographical literature on the life of the Prophet, indicates that Islam was born in a culture of inter-tribal conflicts. The hostility that existed between the Muslims and their enemies during the period of the Qur'ānic revelations was a normal product of the socio-political culture of the time. The fact that the Muslims emerged as a group identified by their religious beliefs generated the Meccans' hostility towards them to the extent that they were twice forced to flee from Mecca, first to Abyssinia and later to Medina. Throughout the thirteen years of the Muslims' stay in Mecca, the Qur'ān instructs them to forgive their enemies and to be patient. In brief, the battles that were fought after the flight to Medina were mainly the result of the culture of vendetta, after the Meccans' defeat at Badr and the participation of certain Jewish tribes in the battle of the Ditch.

[17] For the meaning of the term *kufr* (unbelief in God) and its derivatives in the Qur'ān see Marilyn Robinson Waldman, "The Development of the Concept of Kufr in the Qur'ān", *Journal of the American Oriental* Society, Vol. 88, No. 3, Jul.- Sep., 1968, pp. 442-455; and on the word *kuffār* see, Mbaye Lo, "Seeking the Roots of Terrorism: An Islamic Traditional Perspective", *Journal of Religion and Popular Culture*, Vol. 10, 2005, available from http://www.usask.ca/relst/jrpc/art10-rootsofterrorism-print.html, Internet; accessed 9 June 2007.

Thus, although it is true that the warring parties in these incidents did usually, though not always, belong to different religions, it was not the difference in religion that was the cause of the conflict. A state of war between the Muslims and, in Qur'ānic terms, the idolaters/unbelievers/polytheists of Mecca was the norm until 6/628, when the armistice of al-Ḥudaybiyah was concluded. The reasons for this enmity were hostility, persecution and aggression, not the holding of different beliefs and the religious definitions that identified the enemy combatants were not a justification for acts of war.

Shaltūt, Sachedina and Sherman A. Jackson have reached the same conclusion. Writing in 1940, Shaltūt explains that the word "unbelievers" in the Qur'ān refers to "those hostile polytheists who fight the Moslems, commit aggression against them, expel them from their homes and their property and practise persecution for the sake of religion".[18] Referring to the Qur'ānic justification for the use of force against the unbelievers, Sachedina states: "It is not unbelievers as such who are the object of force, but unbelievers who demonstrate their hostility to Islam by, for example, persecution of the Muslims."[19] Moreover, there is not a single instance of fighting between Muslims and non-Muslims arising from a Qur'ānic revelation. The fact that the Qur'ānic phrases calling upon Muslims to fight "the polytheists" have not been read in this context has led to the common, erroneous conclusion found in outsider literature and in the writings of certain classical Muslim scholars that these verses call upon Muslims to wage an offensive war against non-

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[18] Rudolph Peters, trans. and ed., *Jihad in Mediaeval and Modern Islam: The Chapter on Jihad from Averroes' Legal Handbook 'Bidayat Al-Mudjtahid' and The Treatise 'Koran and Fighting' by The Late Shaykh Al-Azhar, Mahmud Shaltūt* (Leiden: Brill, 1977), note by Shaltūt, p. 50.

[19] Sachedina, "The Development of *Jihad* in Islamic Revelation and History", p. 43. Elsewhere, Sachedina reaffirms: "It is not all unbelievers who are the target of force, but unbelievers who demonstrate their hostility to Islam by persecution of the Muslims." See his, *The Islamic Roots of Democratic Pluralism* (Oxford: Oxford University Press, 2001), p. 115; see also Sherman A. Jackson, "Jihad and the Modern World", *Journal of Islamic Law and Culture*, Vol. 7, No. 1, 2002, pp. 14 f.; Margaret Pettygrove, "Conceptions of War in Islamic Legal Theory and Practice", *Macalester Islam Journal*, Vol. 2, Issue 3, 2007, p. 37.

Muslims if they refuse to accept Islam or pay the *jizyah* (tax levied to exempt eligible males from conscription).[20]

### 2.2.3 The Order of the Qur'ān

Approaching the Qur'ān to study its position on war is highly problematic for any researcher who is not trained in a number of Qur'ānic studies disciplines. The first obstacle arises because the Qur'ān is not arranged chronologically or according to subject. Thus, Martin concludes: "literary criticism and traditional exegesis… have not brought us [Western scholars] much closer to understanding or even appreciating the Qur'ān as a speech act formed within the present order of *suras* and *ayas*."[21] But for Muslims, at least those who are familiar with the Qur'ān and its context, Martin adds that the Qur'ān "has identifiable contextual circumstances within which Muslims render and interpret meaning. The Qur'ān does not 'mean' something outside of socio-cultural contexts".[22]

Muslim scholars agree that the order of the text of the Qur'ān was determined by the Prophet. The Angel Gabriel directed the Prophet about the order of each verse and chapter throughout the Qur'ān and the Prophet instructed the *kuttāb al-waḥī* (scribes of the revelation) accordingly. This means that the order of the Qur'ān is

[20] *Jizyah*, according to T.W. Arnold, "released [non-Muslims] from the compulsory military service that was incumbent on their Muslim fellow-subjects". See T.W. Arnold, *The Preaching of Islam: A History of the Propagation of the Muslim Faith*, 2nd ed. rev. & enl. (London: Constable & Company, 1913), p. 59; see also Niaz A. Shah, *Self-Defense in Islamic and International Law: Assessing Al-Qaeda and the Invasion of Iraq* (New York: Palgrave Macmillan, 2008), pp. 19 f.; George W. Gawrych, "Jihad, War, and Terrorism", available from http://smallwarsjournal.com/documents/gawrych.pdf; Internet; accessed 21 March 2009, p. 5. On the rules of *jizyah* in Islamic law, see, for example, Muḥammad ibn Abī Bakr ibn Qayyim al-Jawziyyah, *Aḥkām ahl al-Dhimmah*, ed. Abī Barā' Yūsuf ibn Aḥmad al-Bakrī and Abī Aḥmad Shākir ibn Tawfīq al-ʿĀrūrī (Al-Dammam: Ramādī lil-Nashr, 1997/1418), Vo. 1, pp. 79-111, 119-245. See also Andrew G. Bostom, ed., *The Legacy of Jihad: Islamic Holy War and the Fate of Non-Muslims* (New York: Prometheus Books, 2008), pp. 29-37.

[21] Martin, "Understanding the Qur'ān in Text and Context", pp. 374 f. See also Michael Bonner, *Jihad in Islamic History: Doctrines and Practices* (Princeton: Princeton University Press, 2006), pp. 23 f.

[22] Martin, "Understanding the Qur'ān in Text and Context", pp. 367, 374.

*tawqīfī*, i.e., arranged according to divine ordinance.[23] Gabriel used to revise the Qur'ān with the Prophet once a year, and twice in the year of the Prophet's demise. Moreover, several ḥadīths refer to the same order of some verses in the Qur'ān as obtains today.[24]

Although Kamali says that "no particular order can be ascertained in the sequence of its text",[25] it is obvious that, in general, the short chapters have one subject, while long chapters have more than one. Each chapter is named after its main subject. For this reason, a few chapters have more than one name.[26] The Qur'ān was revealed piecemeal[27] since many Qur'ānic verses were revealed in response to particular incidents or questions directed to the Prophet. Some of the Qur'ānic verses on peace and war were addressed to the Prophet and the Muslims, to tell them directly what to do with their enemy throughout the twenty-three-year period of the revelation of the Qur'ān.

It is a characteristic of the Qur'ān that several chapters throughout the Qur'ān contain references, narrations or injunctions related to many subjects, with references to the same subject sometimes being found in several different places in the same chapter. References to "war", "fighting", "jihād", and "murder" exist in thirty-four chapters throughout the Qur'ān. While some of these references address the struggle between the Muslims and their enemies, many address stories about prophets and nations prior to Islam, as well as murder and the pre-Islamic custom of female infanticide.

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[23] Ẓāfir al-Qāsimī, *Al-Jihād wa al-Ḥuqūq al-Dawliyyah al-ʿĀmmah fī al-Islām* (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1982), pp. 14, 53-55.

[24] See Muhammad Hashim Kamali, *Principles of Islamic Jurisprudence*, 3rd rev. & enl. ed. (Cambridge: Islamic Texts Society, 2003), p. 17; ʿAbd al-Badīʿ Abū Hāshim Muḥammad, "Al-Suwar al-Qur'āniyyah", in ʿAlī Jumʿah, ed., *Al-Mawsūʿah al-Qur'āniyyah al-Mutakhaṣiṣah* (Cairo: Supreme Council for Islamic Affairs, 2003/1423), pp. 232 f.

[25] Kamali, *Principles*, p. 18.

[26] Watt, *Bell's Introduction to the Qur'ān*, p. 59.

[27] Qur'ān 17:106.

One of the challenges facing researchers on the Qur'ānic position on war is determining the chronological order of these scattered references to the Muslims' struggle with their enemies. A rough chronology of some of these incidents could be determined in the light of the known sequence of the incidents, as well as in cases of agreement among reporters about the context and timing of a certain revelation. Otherwise, the only way to determine the chronology of the rest of the verses is by speculation. This means it is impossible to determine a definite chronology and the context of a few verses that would pinpoint the Qur'ānic position on war is therefore also uncertain.[28] This leads to diverse interpretations of such verses and hence different theories on the Qur'ānic position on war.

### 2.2.4 Meccan and Medinan Revelations

Muslim scholars divide the Qur'ān into Meccan and Medinan revelations, i.e., verses and chapters. However, they adopt three different approaches to identifying each genre. The first is to identify as "Meccan revelations" those verses revealed in Mecca and its surroundings before the *hijrah* (flight) to Medina, while the "Medinan revelations" are the verses revealed after the *hijrah*, even if they were revealed in Mecca. The second is to call the verses revealed in Mecca and its surroundings both before and after the *hijrah* "Meccan revelations", while the "Medinan revelations" are only the verses revealed in Medina. The third, is to regard as "Meccan revelations" the verses addressing the people of Mecca, while the "Medinan revelations" are the verses addressing the people in Medina. Scholars agree on identifying eighty-two Meccan and twenty Medinan chapters, but differ on the

[28] See Sayyid Quṭb, *Fī Ẓilāl al-Qur'ān* (Beirut: Dār al-Shurūq, 1982), Vol. 3, p. 1429.

remaining twelve chapters.[29] The significance for the study of war of identifying the Meccan and Medinan revelations is that it helps researchers to follow the Qur'ānic positions vis-à-vis the Muslims' enemies through these two stages.

Researchers into the issue of war in the Qur'ān should consider all the relevant verses and interpret each verse in its own context. Moreover, all the verses should be read in the light of the general message of the Qur'ān concerning the Islamic worldview and the relationship of Muslims towards others. Muslim scholars affirm that the Qur'ān is an "indivisible whole" so that "any attempts to follow some parts of the Qur'ān and abandon others will be totally invalid".[30] For this reason, Muslim scholars advocate that the best tool for the interpretation of the Qur'ān is the Qur'ān itself,[31] so, in order to reach a conclusion on the Islamic position on a particular subject it is a prerequisite to study all the relevant Qur'ānic verses and the disciplines invented by Muslim jurists and exegetes, which will now be discussed.

### 2.3 Qur'ānic Disciplines

In order to derive rulings based on the Qur'ān, Muslim jurists classified the texts of the Qur'ān into the following disciplines:

**a) *Al-ʿĀmm wa al-Khāṣ*** (the general and the specific): a text that is *ʿāmm* refers to a general category of people,[32] while a text that is *khāṣ* refers to a particular individual or category of people.

**b) *Al-Muḥkam wa al-Mutashābih*** (definite and obscure): a text that is *muḥkam* is a definite; clearly understood text, while a text that is *mutashābih* is obscure or liable

[29] Muḥammad Bakr Ismāʿīl, "Al-Makkī wa al-Madanī", in ʿAlī Jumʿah, ed., *Al-Mawsūʿah al-Qur'āniyyah al-Mutakhaṣiṣah* (Cairo: Supreme Council for Islamic Affairs, 2003/1423), pp. 588-593.
[30] Kamali, *Principles*, p. 18.
[31] ʿAbdur Raḥmān I. Doi, *Sharīʿah: The Islamic Law* (London: Ta Ha, 1984/1404), p. 7; Jamal Badawi, "Muslim/Non-Muslim Relations: Reflections on some Qur'ānic Texts", *Scientific Review of the European Council for Fatwa and Research*, No. 6, January 2005/Dhū al-Ḥijjah 1425, p. 281.
[32] For example Qur'ān 2:82; 7:158; 34:28; 46:17-18; 55:26.

to various interpretations. Some scholars hold, however, that *muḥkam* refers to abrogating texts, while *mutashābih* refers to abrogated texts.

**c) *Asbāb al-Nuzūl*** (reasons of revelation, occasions of revelation): since many verses were revealed in response to particular incidents or questions directed to the Prophet, knowing the occasion or reason of revelation of these verses helps clarify their meanings and, more importantly, is essential in deriving juridical rulings from these verses, as explained in the following discipline.

**d) *ʿUmūm al-Lafẓ wa Khuṣūṣ al-Sabab***: texts that have *asbāb al-nuzūl* are divided into three forms: (1) *ʿumūm al-lafẓ wa ʿumūm al-sabab*: those that refer to a general category of people in a general context;[33] rulings included in this category of texts are applicable in law; (2) *khuṣūṣ al-lafẓ wa khuṣūṣ al-sabab*: those that refer to particular individuals and/or a specific incident;[34] rulings included in this category of texts are applicable only to the addressee(s) and the particular incident referred to. (3) *ʿUmūm al-lafẓ wa khuṣus al-sabab*: those that refer to people in general but in relation to a specific circumstance.[35] Jurists disagree about how rulings included in this category of texts should be applied. The majority argue that the application should extend to everyone in the same situation as the original addressees and not restricted to those for whom the text was originally revealed unless the text itself indicates otherwise. A minority of jurists argue the opposite: that rulings included in this category of texts were only meant to be applied to those for whom the text was originally revealed. The jurists who argue the first position differ on whether the

[33] For example Qur’ān 2:220.
[34] For example Qur’ān Chapter 111.
[35] For example Qur’ān 24:6-9.

extension of the application of such a ruling should be strictly on the basis of the text itself or by drawing an analogy from the text.[36]

**e) *Al-Nāsikh wa al-Mansūkh*** (abrogating and abrogated): The theory of *naskh* (abrogation) of some of the Qur’ānic texts is the most important of all the Qur’ānic disciplines for determining juridical rulings in many issues. It crucially developed a position in the classical theory of war in Islam, as explained in the next chapter. The jurists’ approach to this theory determines the framework for discerning the Qur’ānic position on war. However, this is a most controversial theory. Although jurists differ on the nuances of its definition, abrogation may be defined as the termination of a *ḥukm sharʿī* (legal ruling) and its replacement by another. It occurs in legal rulings, i.e., commands, prohibitions, and injunctions regarding recommended, reprehensible and permissible acts. It cannot occur in texts that narrate past events or discuss beliefs and moral questions. [37]

In fact, Muslims disagree over the very existence of abrogation in the Qur’ān. Those who say that it exists quote two verses (2:106; 16:101) to support their view that God abrogates some *ayāt* (verses) by others. Those who deny its existence argue that these verses mean that the Qur’ān abrogates earlier revelations.[38] Another controversy over abrogation relates to the meaning of the term, and thus to the nature

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[36] Muḥammad al-Sayyid Jibrīl, “ʿUmūm al-Lafẓ wa Khuṣūṣ al-Sabab”, in ʿAlī Jumʿah, ed., *Al-Mawsūʿah al-Qur’āniyyah al-Mutakhassiṣah* (Cairo: Supreme Council for Islamic Affairs, 2003/1423), pp. 51-57.

[37] See Kamali, *Principles*, p. 202; ʿAlī ibn Aḥmad ibn Saʿīd ibn Ḥazm, *Al-Nāsikh wa al-Mansūkh fī al-Qur’ān al-Karīm*, ed. ʿAbd al-Ghaffār Sulaymān al-Bindārī (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1986/1406), p.8; ʿAlī ibn Muḥammad al-Āmidī, *Al-Iḥkām fī Uṣūl al-Aḥkām*, ed. Sayyid al-Jimīlī (Beirut: Dār al-Kitāb al-ʿArabī, 1983-4/1404), Vol. 3, pp. 111-199; ʿAbbās Ḥusnī Muḥammad, *Al-Fiqh al-Islāmī: Āfāquh wa Taṭawwuruh*, Daʿwah al-Ḥaq, Issue 10, October/November 1981/Muḥarram 1402, 2nd ed. (Mecca: Muslim World League, 1993-4/1414), p.105; Richard Bonney, *Jihād: From Qur’ān to bin Laden* (Basingstoke: Palgrave Macmillan, 2004), pp. 24 f.; Muḥammad Ṭalaat al-Ghunaimi, *Qānūn al-Salām fī al-Islām* (Alexandria, Egypt: Munsha’ah al-Maʿārif, 2007), pp. 129-141; Muhammad Abdel Haleem, *The ‘Sword Verse’ Myth* (London: School of Oriental and African Studies, 2007), p. 26; Yūsuf al-Qaraḍāwī, *Fiqh al-Jihād: Dirāsah Muqāranah li-Aḥkāmih wa Falsafatih fī Ḍaw’ al-Qur’ān wa al-Sunnah* (Cairo: Maktabah Wahbah, 2009), Vol. 1, pp. 271 f.

[38] Muḥammad Ṭalaat al-Ghunaimi, *The Muslim Conception of International Law and the Western Approach* (The Hague: Martinus Nijhoff, 1968), p. 111; al-Ghunaimi, *Qānūn al-Salām fī al-Islām*, pp. 131-141; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, pp. 275-284.

of abrogation itself. For some scholars, abrogation is the gradual development of Islamic legislation, which had to take into consideration the reality of changes in circumstances throughout the period of Qur'ānic revelation. The aim of abrogation was, therefore, to ensure the interests of the community by adapting the law to the different circumstances.[39] Abrogation also exemplifies the Islamic philosophy of gradually adapting people to the laws, as in the case of the gradual prohibition of wine.

For other scholars, abrogation is a new ruling that God introduced in order to abrogate a previous one. When they find a Qur'ānic verse, or even a phrase in a verse, that they consider gives a different ruling, instruction or guidance from that in another verse(s), they attempt to reconcile them by arguing that the later verse(s) abrogate the earlier one(s).

However, John Burton gives a conspiratorial explanation of the theory of abrogation in Islam. He maintains that the idea of "conflicting statements" in the Qur'ān and the Sunnah "spurred the [Muslim] scholar to discover a way of removing embarrassment and problem at one and the same time. The concept of *naskh* was the Muslim's ingenious response to the stimulus of embarrassment."[40] However, he refers elsewhere to the verse 4:82, which states that the Qur'ān "cannot contain contradictions".[41]

Muslim scholars advocating the existence of abrogation in the Qur'ān differ sharply in identifying instances of it. The determining factor in deciding which verse abrogates another/others is that the most recently revealed abrogates that revealed

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[39] Muḥammad Bakr Ismāʿīl, "Al-Naskh fī al-Qur'ān", in ʿAlī Jumʿah, ed., *Al-Mawsūʿah al-Qur'āniyyah al-Mutakhaṣiṣah* (Cairo: Supreme Council for Islamic Affairs, 2003/1423), pp. 649 f. See also Kamali, *Principles*, p. 203.
[40] John Burton, *The Sources of Islamic Law: Islamic Theories of Abrogation* (Edinburgh: Edinburgh University Press, 1990), p. 4.
[41] John Burton, "Naskh", *Encyclopaedia of Islam*, New ed., Vol. VII, p. 64.

earlier. It is worth noting here that deciding an instance of abrogation in the Qur'ān and determining which verse or phrase abrogates the other/s if a chronological order cannot be determined is left to the discretion of each individual scholar. Since it is impossible to determine an accurate chronology of all the Qur'ānic verses, the theory of abrogation has been applied unwarrantedly to too many Qur'ānic texts.[42] It is applied even to consecutive verses. For example, two instances of abrogation allegedly occur in four consecutive verses on fighting. Chapter Two, verse 191 allegedly abrogates verse 190 and verse 193 abrogates verse 192.[43] Commenting on this allegation, al-Rāzī (d. 606/1209) remarks: "It is improbable that the Wise One [God] brings some verses together in pairs of which one verse abrogates the other."[44]

Moreover, a phrase may be alleged to abrogate a preceding phrase in the same verse. For example, Ibn al-Bārizī (d. 738/1338) maintains that the phrase of the so-called "sword verse" (9:5): "but if they repent and perform prayer and give the poor-due, then leave them their way", abrogates the immediately preceding phrase in the same verse: "When the Sacred Months have passed, kill the polytheists wherever you find them and capture them and besiege them and await for them in every place of ambush." Strangely enough, he even maintains that part of the ruling included in this verse is abrogated by the verse that follows it (9:6), though he maintains that 9:5 abrogates one hundred and fourteen texts in fifty-two chapters in the Qur'ān.[45]

Scholars give considerably different numbers for the occurrences of abrogation in the Qur'ān, ranging from 5 to 21, 66, 213, 214, 247, and even 500.[46]

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[42] See al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, pp. 272, 305-310.
[43] Peters, trans. and ed., *Jihad in Mediaeval and Modern Islam*, p. 53.
[44] Quoted in Ibid., p. 54.
[45] Hibah Allah ibn ʿAbd al-Rahīm ibn al-Bārizī, *Nāsikh al-Qur'ān al-ʿAzīz wa Mansūkhih*, ed. Ḥātim Ṣāliḥ al-Ḍāmin, 4th ed. (Beirut: Mu'assasah al-Risālah, 1988/1408), p. 22.
[46] According to Kamali, these numbers are given respectively by Shāh Wālī Allāh, al-Suyūṭī, ʿAbd al-Qādir al-Baghdādī, Wahbatullāh ibn Salamah, Ibn Ḥazm, Jamāl al-Dīn ibn al-Jawzī and the Muʿtazilah. See Kamali, *Principles*, p. 220. See also Abdel Haleem, *The 'Sword Verse' Myth*, pp. 27 f.

Ibn al-Jawzī (d. 597/1200) points out that what prompted him to write his *Nawāsikh al-Qur'ān* (The Abrogated [texts] of the Qur'ān) was the confusion and errors committed by scholars in identifying the incidents of abrogation.[47]

In fact, some scholars point out that the reason for the unwarranted use of abrogation, apart from the fact that determining its occurrence is left to the discretion of each scholar, is that scholars confused it with the disciplines of *al-ʿāmm wa al-khāṣ*. In other words, they alleged that one text abrogates other/s when it actually specifies a general text.[48]

Some contemporary scholars criticize the classical approach to abrogation and tend to see its occurrence as limited. They view abrogation as a historical and circumstantial phenomenon, or part of a gradual process of legislation, which must be read in context and in the light of the general message of the Qur'ān. It should not have been turned "into a juridical doctrine of permanent validity",[49] as happened at the hands of early scholars. They argue that "This classical concept of permanent abrogation is oblivious of the space-time element which, if taken into account, would have restricted the application of *naskh* to those circumstances alone."[50]

## 2.4 Approaching the Qur'ān

This chapter identifies three approaches to, or levels of readings of, the Qur'ān, discussed below. Muslim scholars enumerate fifteen disciplines which an individual must master to be qualified as an exegete of the Qur'ān, and seven of these are

[47] ʿAbd al-Raḥman ibn ʿAlī ibn Muḥammad ibn al-Jawzī, *Nawāsikh al-Qur'ān* (Beirut: Dār al-Kutub al-ʿIlmiyyah, n. d.), pp. 12 f.
[48] See Ismāʿīl, "Al-Naskh fī al-Qur'ān", p. 649; Kamali, *Principles*, p. 221; al-Ghunaimi, *The Muslim Conception*, p. 111; Badawi, "Muslim/Non-Muslim Relations", p. 279; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, p. 272.
[49] Kamali, *Principles*, p. 223; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, pp. 269-310.
[50] Kamali, *Principles*, p. 223.

Arabic language disciplines.[51] The contemporary, average, educated native speaker of Arabic cannot understand the meaning of several Qur'ānic texts without reference to exegetical works. That is to say that it is no easy task to understand the Qur'ānic position on war and, indeed, it largely depends on the researchers' approaches to the text. Their conclusions vary according to their own understanding of the texts and their context, and whether they apply any exegetical disciplines in their research or merely base their conclusion on a superficial understanding of the texts. In addition, their conclusions vary according to the intermediary they refer to in studying the Qur'ān, i.e., the exegetes' interpretations of the Qur'ān or the jurists' rulings on the verses in question. Furthermore, conveying the contextual meanings of some of the Qur'ānic texts in translation is impossible, leaving aside the fact that many Qur'ānic words are variously understood.

In the light of the above discussion of text and context with regard to the Qur'ān and its disciplines, it can be said that there are the following three approaches to studying the Qur'ān and its position on war.

### 2.4.1 Superficial Approach

In his post 9/11 *War, Terror and Peace in the Qur'ān and in Islam: Insights for Military and Government Leaders*, Schwartz-Barcott "offers dozens of suggestions about how [US] leaders in government and military can use our [Schwartz-Barcott's] growing knowledge of the Qur'ān and its proponents to help sustain peace, defuse terrorism, and if necessary, wage war in effective and just ways."[52] He presents more than a hundred passages from the Qur'ān which he sometimes mistakenly claims to concern war and peace and refers to more than 230 wars and battles from the first

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[51] Muḥammad, "Al-Suwar al-Qur'āniyyah", pp. 252 f.

[52] T.P. Schwartz-Barcott, *War, Terror and Peace in the Qur'ān and in Islam: Insights for Military and Government Leaders* (Carlisle, PA: Army War College Foundation Press, 2004), p. xxiv.

battle in Islam, the battle of Badr (Ramaḍān 2/March 624), up to the US invasions of Afghanistan in 2001 and Iraq in 2003.[53]

Using a concordance, he selects Qur'ānic texts on war and peace from Pickthall's translation of the Qur'ān and his reading of these texts leads him to believe that the Qur'ān does not call for peace with non-Muslims. Peace in the Qur'ān, for him, is an inner spiritual state in the Muslim individual and seen more as a state "of non-hostility between two or more Muslim individuals or Muslim groups than as an esteemed condition of non-belligerence between a Muslim and a non-Muslim nation."[54] In his study of the "causes of war" in the Qur'ān, Schwartz-Barcott quotes four verses, among others, which are in no way related to war (7:30, 34, 38, 40).[55] These are among a number of verses in which God tells the children of Adam not to follow "the Satan" who seduced their parents. Thus humankind is enjoined in these verses to observe justice and refrain from "wrongful oppression".

He confuses verses giving accounts about events prior to Islam with those referring to incidents that took place during the Prophet's lifetime. For example, he quotes two verses from the chapter "Children of Israel" (17:16-17) in which God, speaking in the first person plural, narrates the destruction of "a township" pre-dating Islam. It seems that because of the title of the chapter and the pronoun "We", the author believes that these verses contain a Qur'ānic admission that "Muslims under Muhammad annihilated entire communities of Jews because 'they commit abomination.'"[56]

His reading of a pre-Islamic incident mentioned in chapter 105[57] leads him to express his hope that this chapter "will not be used in order to promote biological,

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[53] Ibid.
[54] Ibid., p. 46.
[55] Ibid., pp. 47 f.
[56] Ibid., p. 67.
[57] Qur'ān 105:1-5.

chemical, or nuclear warfare."[58] Although he remarks that this observation "might seem to be too speculative, morbid, and even a little paranoid",[59] he suggests that, in the light of his reading of the Qur'ān and the Prophet's behaviour as a warrior, these fears are worthy of consideration,[60] but Schwartz-Barcott bases his knowledge of the life of the Prophet solely on Maxime Rodinson's *Muḥammad*, a biography of the Prophet written from the sociological viewpoint of a Communist author.[61]

Although Schwartz-Barcott's work does not represent mainstream Western scholarship, it shows how the Qur'ān can be bizarrely distorted, and he also imposes his military background as a former member of the US Marine Corps on some areas of his book.[62] Schwartz-Barcott's work is put forward here merely as an example of the superficial approach in order to show the necessity for researchers who attempt to study the Qur'ānic position on war to refer to the Qur'ānic exegetical literature and disciplines.

### 2.4.2 Selective-Intermediary Approach

The second approach is by studying the Qur'ān through intermediaries, i.e., the exegetes' interpretations of the Qur'ān. Because of the diverse interpretations of many of the Qur'ānic texts by the exegetes, researchers should specify the exegetes whose work they are studying, in order to take account of their methodologies for

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[58] Schwartz-Barcott, *War, Terror and Peace in the Qur'ān and in Islam*, p. 82.
[59] Ibid., p. 82.
[60] Ibid.
[61] Maxime Rodinson, *Muḥammad*, trans. Anne Carter, 2nd English ed. (London: Penguin, 1996). For a critique of Rodinson's *Muḥammad* see, Muḥammad Muḥammad Abū Laylah, *Muḥammad bayn al-Ḥaqīqah wa al-Iftrā': Fī al-Radd 'alā al-Kātib al-Yahūdī al-Firinsī Maxime Rodinson* (Cairo: Dār al-Nashr lil-Jāmiʿāt, 1999/1420).
[62] It is worth adding here that this book is prefaced by General Anthony C. Zinni, former Commander in Chief, United States Central Command. General Zinni writes in his preface: "a remarkable work that analyzes the cultural, religious, and historical aspects that influence decisions and actions taken by the enemy we face today. It is an insightful tool in helping us understand the nature of this current conflict and in interpreting and predicting actions of the enemy. For decision makers in this conflict, this is a vital guide to analyzing these challenges". p. xvii.

interpreting the texts and the socio-political factors affecting their interpretations of the Qur'ānic position on war throughout Islamic history. Verses may be quoted out of context and the interpretations of exegetes may be selectively presented if the researcher wishes to support a particular view on the Qur'ānic attitude to war. This is one of the major problems in the study of Islam, i.e., the problem of the representation of Islam: who represents Islam?

### 2.4.3 Discipline-Based Approach

What is meant here by a discipline-based approach is that scholars use the Qur'ānic exegetical disciplines mentioned above, or they may use others, in order to present the position of the Qur'ān on war, and then use their own *ijtihād* (exertion of intellectual efforts) to arrive at their own understanding of the position of the Qur'ān. Here scholars also support their positions by referring to other exegetes or jurists to support their understanding of the Qur'ānic position. The main difference between this approach and the selective-intermediary approach is that in this approach scholars depend on their own understanding of the Qur'ānic position, while in the selective-intermediary approach they depend on the understanding of their intermediaries. These intermediaries are usually the earliest exegetes of the Qur'ān, who in turn depend for their interpretations on other intermediaries, i.e., the opinions of the Companions of the Prophet or their successive generations. Exegetes sometimes mention a variety of opinions given by these earliest Muslims about the reasons of revelation and the meaning of particular Qur'ānic texts. They may merely mention these different opinions or advocate a "preferred opinion", or what is called in Islamic scholarship "the majority opinion", and they always end by adding the phrase *wa Allah aʿlam* (God is the knower [of the truth]). This process of interpreting

the Qur'ān exemplifies the independence of Muslim scholars and the absence of institutionalized interpretation of the Qur'ān in Islam.

## 2.5 Qur'ānic Texts on War

The three words (with their derivatives) used in the Qur'ān context of war are: *qitāl* (fighting, murder, killing, infanticide), *jihād* (struggle, striving, war) and *ḥarb* (war). Sixty-nine derivatives of *qitāl* occur altogether one-hundred-and-seventy times in the Qur'ān – ninety-five times in Medinan texts addressing the context of the relationship between Muslims and non-Muslims, and seventy-five times in the contexts of accounts about nations prior to Islam, or retaliation for murder, or the pre-Islamic custom of female infanticide.

Seventeen derivatives of *jihād* occur altogether forty-one times in eleven Meccan texts and thirty Medinan ones, with the following five meanings: striving because of religious belief (21),[63] war (12),[64] non-Muslim parents exerting pressure, i.e., *jihād*, to make their children abandon Islam (2),[65] solemn oaths (5)[66] and physical strength (1).[67]

Three derivatives of the word *ḥarb* occur altogether six times, all in Medinan texts, with the following four meanings: war with non-Muslims (3),[68] banditry as war against society (1),[69] figurative punishment by God in the Hereafter or by the

[63] Qur'ān 2:218; 5:35-54; 8:72-74-75; 9:19-20-73; 16:110; 22:78-78; 25:52-52; 29:6-6- 69; 47:31; 49: 15; 60:1; 66:9.
[64] Qur'ān 3:142; 4:95-95-95; 9:16-24-41-44-81-85-88; 61:11.
[65] Qur'ān 29:8; 31:15.
[66] Qur'ān 5:53; 6:109; 16:38; 24:53; 35:42.
[67] Qur'ān 9:79.
[68] Qur'ān 8:57; 9:107; 47:4.
[69] Qur'ān 5:33. See Chapter Five.

Prophet in this world for dealing by usury (1)[70] and war in a pre-Islamic context (1).[71]

Firestone maintains that when the phrase *fī sabīl Allah* (in the path of God) qualifies the word jihād, it identifies jihād as "furthering or promoting God's kingdom on earth."[72] He does not, however, give a reference or example to illustrate this meaning, although the phrase *fī sabīl Allah* occurs sixty-eight times in the Qur'ān. In fact, none of the texts where the word jihād occurs in the Qur'ān in conjunction with the phrase *fī sabīl Allah* gives this meaning of "furthering or promoting God's kingdom on earth." There are also three occurrences of the word *sabīlī* (My way, i.e., God's way), eleven occurrences of the word *sabīlih* (His way, i.e., God's way) and one occurrence of the word *subulinā* (Our ways, i.e., God's ways). They occur in eleven Meccan and fifteen Medinan chapters in the following five senses in the Qur'ān: debarring people from God's religion or violating God's religion or referring to God's religion in general (35),[73] warring or fighting in God's cause (20),[74] fleeing persecution for following God's religion or struggling for God's religion (17),[75] giving money for God's cause, either for preparing the army or as charity to the poor (10)[76] and preaching the religion of God (1).[77] Some of these senses, such as fighting in God's cause and debarring people from following God's religion, address pre-Islamic contexts.[78]

[70] Qur'ān 2:279.
[71] Qur'ān 5:64.
[72] Firestone, *Jihād*, p. 17.
[73] Qur'ān 2:217; 3:99-195; 4:160-167; 6:116-117-153; 7:45-86; 8:36-47; 9:9-34; 11:19; 12:108; 14:3-30; 16:88-94-125; 22:9-25; 29:69; 31:6; 38:26-26; 39:8; 47:1-32-34; 53:30; 58:16; 63:2; 68:7.
[74] Qur'ān 2:154-190-244; 3:13-146-157-167-169; 4:74-74-75-76-94-95; 9:24-111; 47:4; 73:20; 60:1; 61:4.
[75] Qur'ān 2:218; 4:89-100; 5:35-54; 8:72-74; 9:19-20-38-41-81-120; 22:58; 24:22; 49:15; 61:11.
[76] Qur'ān 2:195-261-262-273; 4:84; 8:60; 9:34-60; 47:38; 57:10.
[77] Qur'ān 16:125.
[78] Qur'ān 3:146; 7:86; 38:26-26.

The phrase *fī sabīl Allah* therefore indicates an act done for, or because of the religion of, God. In other words, as Muhammad Abdel Haleem explains, the phrase *fī sabīl Allah* in the Qur'ān indicates "the way of truth and justice, including all the teachings it gives on the justifications and the conditions for the conduct of war and peace".[79] Thus when people flee their homes, support their army, tolerate persecution, preach the religion of God, or give charity to the poor, they have in mind that they are doing all these acts for the protection/defence and spread of religion and/or the reward of God. While it has been maintained "that religion as a *casus belli* leads inevitably to total war",[80] it is obvious that any war to defend religion, or in modern terms, for freedom of religion, is a just war. The crucial point in the study of the tradition of war in Islam is deciding whether jihād or fighting *fī sabīl Allah* is a "holy war" or a "just war" in the Western sense. This necessitates finding out whether jihād or fighting in Islam is permitted only in self-defence against persecution of, or aggression on, Muslims or whether it is permitted to initiate offensive wars on non-Muslims for the sake of spreading Islam.

In Islamic discourse, at least theoretically or for some of the Muslims, the lives of Muslims are centred around God, since the word "Islam" indicates submission and obedience to God, and everything is viewed in terms of what is *ḥalāl* (permitted) and what is *ḥarām* (prohibited) by God. In other words, everything that is done or avoided is done or avoided with the intention of pleasing God or avoiding His displeasure. Thus, everything that Muslims do is done in the way of God, or according to the way of God, or at least not against the ordinances of God, so that

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[79] Muhammad Abdel Haleem, *Understanding the Qur'ān: Themes and Style* (London: Tauris, 1999), p. 62; see also al-Qāsimī, *Al-Jihād wa al-Ḥuqūq al-Dawliyyah*, pp. 107-109. See also on the concept of *jihād fī sabīl Allah*, Abdulrahman Muhammad Alsumaih, "The Sunni Concept of Jihad in Classical Fiqh and Modern Islamic Thought" (PhD thesis, University of Newcastle Upon Tyne, 1998), pp. 35-47.

[80] John Kelsay, *Islam and War: A Study in Comparative Ethics* (Louisville, KY: Westminster/John Knox, 1993), p. 55.

being good to one's neighbours, smiling on seeing someone's face, giving charity to the poor, loving one's friends *fī Allah* (in God), being good to one's spouse, having sexual relation with one's spouse and avoiding sexual relations outside marriage, working to support one's dependents, seeking knowledge, etc., are all acts done "in God" or "in God's way".[81] According to ḥadīth, a woman's well-performed pilgrimage is jihād *fī sabīl Allah*[82] and travelling in pursuit of knowledge is considered an act *fī sabīl Allah* until one returns.[83] If they lack understanding of this Muslim mindset, outsiders may conclude that jihād *fī sabīl Allah* is the Islamic equivalent of the Western concept of holy war.

Another characteristic of Islam that is often misunderstood by contemporary researchers is that, in Islam morality, legality, and even etiquette are intertwined.[84] Thus it is disturbing to the Western mind to find that justifications of war in Islam are religiously based. However, these Islamic justifications need to be investigated to find out whether they correspond with Western "holy war" or "the just war" theories, irrespective of whether or not they are religiously motivated.

### 2.6 The Qur'ānic *Casus Belli*

The Qur'ānic justifications for war can be examined in the following texts: 2:190-194, 216-217; 4:75-76; 8:38-39, 61; 9:5, 29; 22:39-40; 60:8-9, all of which are

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[81] See Muḥammad Ḥammīdullāh, *Muslim Conduct of State: Being a Treatise on Siyar, That is Islamic Notion of Public International Law, Consisting of the Laws of Peace, War and Neutrality, Together with Precedents from Orthodox Practice and Preceded by a Historical and General Introduction* , rev. & enl. 5th ed. (Lahore: Sh. Muhammad Ashraf, 1968), p. 98.

[82] See ḥadīths numbers 2720 and 2721 in Muḥammad ibn Ismāʿīl al-Bukhārī, *Al-Jāmiʿ al-Ṣaḥīḥ al-Mukhtaṣar*, ed. Muṣṭafā Dīb al-Baghā, 3rd ed. (Damascus; Beirut: Dār ibn Kathīr, 1987/1407), Vol. 3, p. 1054.

[83] See ḥadīth number 20870 in Jalāl al-Dīn al-Suyūṭī, *Jāmiʿ al-Aḥādīth: Al-Jāmiʿ al-Ṣaghīr wa Zawā'iduh wa al-Jāmiʿ al-Kabīr* (N.p.: n.d.), Vol. 7, p. 61; ḥadīth number 2647 in Muḥammad ibn ʿIsā al-Tirmidhī, *Al-Jāmiʿ al-Ṣaḥīh Sunan al-Tirmidhī*, ed. Aḥmad Muḥammad Shākir et al. (Beirut: Dār Iḥyā' al-Turāth al-ʿArabī, n.d.), Vol. 5, p. 29.

[84] See Sobhi Mahmassani, "The Principles of International Law in the Light of Islamic Doctrine", *Recueil des Cours*, Vol. 117, 1966, pp. 228, 319.

Medinan revelations. The first Qur’ānic revelation permitting recourse to war in Islam[85] explains the *casus belli* as follows:

> “Permission to [engage in fighting] is given to those against whom war is waged because they have been wronged; verily God is able to give them victory. Those who have been expelled from their homes unjustly and only for saying: God is our Lord; had not God permitted people to defend themselves against [the aggression of] others, monasteries, churches, synagogues and mosques, wherein the name of God is oft-mentioned, would be pulled down; certainly God will support those who support Him; indeed God is All-Strong, All-Mighty.” (Qur’ān 22:39-40)

This text explains that the Islamic *casus belli* is defence against aggression. It adds that Muslims were expelled from their homes unjustly only because of their belief in God.[86] That is to say that the Islamic *casus belli* here, as John Kelsay puts it, is “a

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[85] See, for example, Ismāʿīl ibn ʿUmar ibn Kathīr, *Tafsīr al-Qur’ān al-ʿAẓīm* (Beirut: Dār al-Fikr, 1980-1/1401), Vol. 3, p. 226; Muḥammad ibn Aḥmad al-Anṣārī al-Qurṭubī, *Al-Jāmiʿ li-Aḥkām al-Qur’ān* (Cairo: Dār al-Shaʿb, n.d.), Vol. 12, p. 68; ʿAbd al-Rāziq ibn Hammām al-Ṣanaʿānī, *Tafsīr al-Qur’ān*, ed. Muṣṭafā Muslim Muḥammad (Riyadh: Maktabah al-Rushd, 1980-1/1401), Vol. 3, p. 39; Jalāl al-Dīn al-Suyūṭī, *Al-Durr al-Manthūr* (Beirut: Dār al-Fikr, 1993), Vol. 6, pp. 57 f.; Muḥammad ibn Muslim ibn ʿUbayd Allah ibn Shihāb al-Zuhrī, *Al-Maghāzī al-Nabawiyyah*, ed. Suhayl Zakkār (Damascus: Dār al-Fikr, 1981), p. 105; Maḥmūd Shaltūt, *Al-Islām wa al-ʿAlāqāt al-Dawliyyah: Fī al-Silm wa al-Ḥarb* ([Cairo]: Maktab Shaykh al-Jāmiʿ al-Azhar lil-Shu’ūn al-ʿĀmmah, n.d.), p. 29; Nādiyah Ḥusnī Ṣaqr, *Falsafah al-Ḥarb fī al-Islām* (Cairo: Supreme Council for Islamic Affairs, 1990/1410), p. 71; Muḥammad ibn Muḥammad ibn Muḥammad ibn Sayyid al-Nās, *ʿUyūn al-Athar fī Funūn al-Maghāzī wa al-Shamā’il wa al-Siyar*, ed. Muḥammad al-ʿĪd al-Khaṭrāwī and Muḥyī al-Dīn Mito (Medina: Maktabah Dār al-Turāth; Damascus; Beirut: Dār ibn Kathīr, n.d.), Vol. 1, p. 352; ʿAbd al-ʿAzīz Zahrān, *Al-Silm wa al-Ḥarb fī al-Islām*, Kutub Islāmiyyah, Issue no. 164 (Cairo: Supreme Council for Islamic Affairs, 1974/1394), p. 35; Muḥammad al-Ṣādiq Afīfī, *Al-Mujtamaʿ al-Islāmī wa al-ʿAlāqāt al-Dawliyyah* (Cairo: Mu’assasah al-Khānjī, 1980), p. 128; Muḥammad ʿIzzat Darwazah, *Al-Jihād fī Sabīl Allah fī al-Qur’ān wa al-Ḥadīth*, 2nd ed. (Beirut: Al-Nāshir, 1990), p. 45; Aḥmad Ghunaīm, *Al-Jihād al-Islāmī: Dirāsah ʿIlmiyyah fī Nuṣūṣ al-Qur’ān wa Ṣiḥāḥ al-Ḥadīth wa Wathā’iq al-Tārīkh* (Cairo: Dār al-Ḥammamī, 1975/1394), pp. 17-19; Muṣṭafā al-Sibāʿī, *Al-Sīrah al-Nabawiyyah: Durūs wa ʿIbar* (Beirut: Al-Maktab al-Islāmī, n.d.), pp. 113 f.; al-Quṭb Muḥammad al-Quṭb Ṭabliyyah, *Al-Islām wa Ḥuqūq al-Insān: Al-Jihād* ([Cairo]: Dār al-Fikr al-ʿArabī; al-Nahḍah al-Miṣriyyah; al-Mujallad al-ʿArabī, al-Ṣaḥwah, 1989/1409), p. 22; Muḥammad Sayyid Ṭanṭāwī, “Al-Ḥukm al-Sharʿī fī Aḥdāth al-Khalīj”, *The Islamic Fiqh Council Journal*, Issue No. 5, [1991/1411], pp. 57 f.; Doi, *Sharīʿah: The Islamic Law*, p. 438; Bernard K. Freamon, “Martyrdom, Suicide, and the Islamic Law of War: A Short Legal History”, *Fordham International Law Journal*, Vol. 27, 2003, p. 314; Badawi, “Muslim/Non-Muslim Relations”, p. 270; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, pp. 229-231.

[86] See, for example, Muḥammad ibn Jarīr al-Ṭabarī, *Jāmiʿ al-Bayān ʿan Ta’wīl Āy al-Qur’ān* (Beirut: Dār al-Fikr, 1984-5/1405), Vol. 17, p. 174; Ibn Kathīr, *Tafsīr*, Vol. 3, p. 226; al-Qurṭubī, *Al-Jāmiʿ*,

defense of human rights".[87] In other words, this verse supports the protection of religious freedom[88] in general since the protection of monasteries, churches, synagogues and mosques is given as a justification for defensive war.[89]

A few years after the flight from Mecca, the persecution of *al-mustaḍʿafīn* (the oppressed socially weak Muslims who were unable to flee Mecca) is advocated as a *casus belli*:

> "Would not you fight in the way of God for *al-mustaḍʿafīn* (the oppressed socially weak Muslims) from men, women and children who pray: Our Lord! Take us from this city of the oppressive people and appoint for us from Your side a guardian and appoint for us from Your side a protector. Those who have believed fight in the way of God and those who disbelieve fight in the way of Satan, so fight the allies of Satan; surely the plot of Satan is weak." (Qur'ān 4:75-76)

This text is not connected with any specific incident of war, but justifies having recourse to war in order to stop the religious persecution of the Muslim minority in Mecca at that time.[90] Here, fighting to stop the religious persecution of Muslims is

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Vol. 12, p. 69; Muḥammad ibn ʿAlī ibn Muḥammad al-Shawkānī, *Fatḥ al-Qadīr: Al-Jāmiʿ bayn Fannay al-Riwāyah wa al-Dirāyah min 'Ilm al-Tafsīr* (Beirut: Dār al-Fikr, n.d.), Vol. 3, p. 457; al-Sibāʿī, *Al-Sīrah*, p. 114; Ghunaym, *Al-Jihād al-Islāmī*, p. 19; Ṭabliyyah, *Al-Islām wa Ḥuqūq al-Insān*, p. 43; Doi, *Sharīʿah: The Islamic Law*, p. 439.

87 Kelsay, *Islam and War*, p. 54. See also Zayd ibn ʿAbd al-Karīm al-Zayd, *Muqaddimah fī al-Qānūn al-Dawlī al-Insānī fī al-Islām* (N.p.: Comité International Genève, ICRC, 2004), p. 12.

88 Al-Zayd, *Al-Qānūn al-Dawlī al-Insānī*, p. 12; Maḥmūd Fayyāḍ, "Al-Siyāsah al-Khārijiyyah lil-Islām", *Majalah al-Azhar*, December 1951/Rabīʿ al-Awwal 1371, p. 204; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1. p. 232.

89 See, for example, al-Ṭabarī, *Jāmiʿ al-Bayān*, Vol. 17, pp. 174-178; Ibn Kathīr, *Tafsīr*, Vol. 3, p. 227; al-Qurṭubī, *Al-Jāmiʿ*, Vol. 12, pp. 70-72; al-Suyūṭī, *Al-Durr al-Manthūr*, Vol. 6, pp. 59 f.; al-Shawkānī, *Fatḥ al-Qadīr*, Vol. 3, p. 457; ʿAbd al-Munʿim al-Ḥifnī, *Mawsūʿah al-Qur'ān al-ʿAẓīm* (Cairo: Maktabah Madbūlī, Vol. 2, 2004), Vol. 2, pp. 1868, 1872; C.G. Weeramantry, *Islamic Jurisprudence: An International Perspective* (Basingstoke: Macmillan, 1988), p. 162; A. Rashied Omar, "Conflict and Violence", in Richard C. Martin, ed., *Encyclopedia of Islam and the Muslim World* (New York: Macmillan Preference USA, 2004), Vol. 1, p. 157; al-Sibāʿī, *Al-Sīrah*, pp. 115 f.; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, p. 231

90 On the recourse to war for the protection of nationals abroad, by some states since 1945, under the justification of self-defence in international law, see Derek W. Bowett, "The Use of Force for the

given as another reason for fighting *fī sabīl Allah*. Riḍā states that fighting in the way of God was permitted to stop the persecution of Muslims who were prevented from fleeing Mecca to follow Islam.[91] Thus, according to the words of Riḍā and al-Marāghī, war in Islam was permitted in order to protect *ḥurriyyah al-dīn* (freedom of religion).[92] In addition to stopping the religious persecution of Muslim minorities and liberating Muslim and *dhimmi* prisoners of war, al-Qaraḍāwī adds in the light of this text that the Islamic state should also go to war to rescue non-Muslim minorities if they require its help and if it is able to rescue them.[93]

Some exegetes consider that it is not Qur'ān 22:39-40 that is the first revelation permitting war in Islam, but Qur'ān 2:190-194, although the majority maintain that these verses were revealed in connection with the incident of al-Ḥudaybiyah (6/628), discussed in the previous chapter.[94] The text reads as follows:

> "And fight in the way of God those who fight against you but *lā taʿtadūā* (do not transgress); indeed God does not like transgressors. (190) And fight them wherever you find them and expel them from wherever they expelled you, and *fitnah* [persecution] is more grievous than killing, and do not fight them at the Sacred Mosque until they fight you therein; but if they fight you, then kill them; such is the recompense of the unbelievers. (191) But if they *intahaūā* (cease) then, indeed, God is Most Forgiving, Most Merciful. (192) And fight them so that/until there is no *fitnah* [persecution] and religion [without *fitnah*] is for God, but if they *intahaūā* (cease), then there is no

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Protection of Nationals Abroad", in A. Cassese, ed., *The Current Legal Regulation of the Use of Force* (Dordrecht: Martinus Nijhoff Publishers, 1986), pp. 39-55.

[91] Muḥammad Rashīd Riḍā, *Tafsīr al-Qur'ān al-Ḥakīm: Al-Shahīr bi-Tafsīr al-Manār* (Cairo: Dār al-Manār, 1910/1328), Vol. 5, pp. 259 f. See also al-Shawkānī, *Fatḥ al-Qadīr*, Vol. 1, pp. 487 f.; al-Ṭabarī, *Jāmiʿ al-Bayān,* Vol. 5, pp. 167-169.

[92] Riḍā, *Tafsīr al-Manār*, Vol. 5, p. 260. See also Aḥmad Muṣṭafā al-Marāghī, *Tafsīr al-Marāghī* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1946/1365), Vol. 2, p. 92, Vol. 9, pp. 207 f.

[93] Al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, pp. 241 f., 435 f., Vol. 2, pp. 865-871.

[94] See, for example, Ibn Kathīr, *Tafsīr*, Vol. 1, p. 227; al-Qurṭubī, *Al-Jāmiʿ*, Vol. 2, p. 347.

> fighting/hostility except against the persecutors. (193) [Fighting in] The Sacred Month is for [fighting against you] in The Sacred Month and [violation] of the prohibitions [subject to the law of] retaliation; therefore whoso commits aggression against you, then respond within the same degree of aggression waged against you; and fear God and know that God is with those who fear Him." (194)

The *locutionary act* in this text: "fight in the way of God" is clarified by four conditions.

(1) "Those who fight against you". This indicates permission to fight in the way of God against those who initiate aggression against Muslims. Thus, if this text was revealed in relation to the incident of al-Ḥudaybiyah, it gave its addressees permission to defend themselves if the Meccans attacked them, while if it is intended for wider application, it permits Muslims to defend themselves against any aggression in general.

(2) "*Lā taʿtadūā*" is understood by some to mean a prohibition against the initiation of aggression,[95] while most exegetes interpret this phrase as the Islamic *jus in bello* (rules regulating the conduct during war). They explain that this phrase indicates the prohibition of targeting non-combatants,[96] such as women, children, the aged and the clergy, or those with whom Muslims have a peace agreement, and also that it amounts to the prohibition of mutilation, unnecessary burning and destruction, cutting down trees, killing animals except for food, surprising the enemy with an act of war without a declaration of war, and fighting for personal gain or glory.[97]

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[95] Riḍā, *Tafsīr al-Manār*, Vol. 2, p. 208.

[96] Al-Ṭabarī, *Jāmiʿ al-Bayān*, Vol. 2, pp. 189 f.; al-Qurṭubī, *Al-Jāmiʿ*, Vol. 2, p. 350; Riḍā, *Tafsīr al-Manār*, Vol. 2, p. 208; Quṭb, *Ẓilāl*, Vol. 1, p. 188.

[97] See, for example, al-Ṭabarī, *Jāmiʿ al-Bayān*, Vol. 2, p. 190; Ibn Kathīr, *Tafsīr*, Vol. 1, pp. 227 f.; al-Qurṭubī, *Al-Jāmiʿ*, Vol. 2, pp. 348-350; Quṭb, *Ẓilāl*, Vol. 1, pp. 188-190; Maḥmūd ibn ʿUmar al-Zamakhsharī, *Al-Kashshāf ʿan Ḥaqāʾiq Ghawāmiḍ al-Tanzīl wa ʿUyūn al-Aqāwī fī Wujūh al-Taʾwīl*,

This *jus in bello* concept is reinforced in the phrase *faman iʿtadā ʿalaykum* (whoso commits aggression against you), *fāʿtadūā ʿalayh bi-mithl mā iʿtadā ʿalaykum* (then respond within the same degree of aggression waged against you). (3) Prohibition of fighting at the Sacred Mosque, unless they are attacked therein. (4) Cessation of fighting if the enemy *intahaūā* (desist). Most exegetes interpret this word to mean that cessation of fighting is conditional upon the enemy ending their aggression against, and religious persecution of, Muslims and ceasing their unbelief in God.[98] Al-Qurṭubī interprets it to mean ending their unbelief in God, if they were pagans, or paying the *jizyah* if they were People of the Book.[99] So it is apparent that some exegetes did not distinguish between ending aggression against Muslims and ending unbelief in God as the condition for the cessation of fighting, and this could significantly confuse what this text stipulates as the justification for the recourse to fighting. That is to say that it is not clear here whether Muslims are permitted to fight their enemies either until they stop their aggression or until they end their unbelief in God. Quṭb clarifies this by stating that Muslims are to have peaceful relations with their enemies if they stop their aggression on, and persecution of, Muslims, but the forgiveness and mercy of God is conditional upon their ending their unbelief.[100]

The meaning of the term *fitnah* in the *locutionary act*, “*fitnah* is more grievous than killing”, is very significant for understanding the Qur’ānic justifications for war in this text. While exegetes sometimes refer to *fitnah* as unbelief in God, they interpret this *locutionary act* to mean that abandoning Islam

ed. Muḥammad ʿAbd al-Salām Shāhīn (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1995), Vol. 2, p. 230; ʿAbd Allah ibn Aḥmad ibn Maḥmūd al-Nasafī, *Tafsīr al-Nasafī*, ed. Yūsuf ʿAlī Bedīwī (Beirut: Dār ibn Kathīr, 1998/1419), Vol. 1, p. 165; al-Ḥifnī, *Mawsūʿah al-Qur’ān*, Vol. 2, p. 1866.

[98] Al-Ṭabarī, *Jāmiʿ al-Bayān*, Vol. 2, p. 193.

[99] Al-Qurṭubī, *Al-Jāmiʿ*, Vol. 2, p. 354.

[100] Quṭb, *Ẓilāl*, Vol. 1, p. 190.

under torture is worse for a Muslim than being put to death under torture.[101] This refers to Bilāl ibn Rabāḥ, the Companion of the Prophet, who was tortured to make him recant, and Sumayyah and her husband Yāsir, who were killed under torture because of their refusal to abjure Islam.[102] Other exegetes interpret it to mean that the Meccans' unbelief is worse than the incident of the killing of ʿAmr ibn al-Ḥaḍramī, who was killed by Wāqid ibn ʿAbd Allah al-Tamīmī.[103] In this context, al-Zamakhsharī and al-Nasafī refer to situations in which a person suffers to the extent of preferring to die rather than tolerating the persecution or its consequences; for example, it was considered preferable to die rather than suffering the persecution of being expelled from one's home.[104]

This concept of *fitnah*[105] in the sense of religious persecution and torture to make Muslims abjure Islam is reinforced again in Qur'ān 2:216-217:

> "Fighting has been enjoined on you though it is hateful to you; but you may hate a thing while it is good for you and you may like a thing while it is bad for you; and God knows and you do not know. (216) They ask you about

[101] Al-Ṭabarī, *Jāmiʿ al-Bayān*, Vol. 2, p. 191; al-Qurṭubī, *Al-Jāmiʿ*, Vol. 2, p. 351; al-Marāghī, *Tafsīr al-Marāghī*, 2, pp. 89 f.; Muḥammad Abū Zahrah, *Zahrah al-Tafāsīr* (Cairo: Dār al-Fikr al-ʿArabī, 1987?), Vol. 1, p. 580; Muḥammad ibn Ismāʿīl al-Ṣanaʿānī, "Baḥth fī Qitāl al-Kufār", in Yūsuf al-Qaraḍāwī, *Fiqh al-Jihād: Dirāsah Muqāranah li-Aḥkāmih wa Falsafatih fī Ḍaw' al-Qur'ān wa al-Sunnah* (Cairo: Maktabah Wahbah, 2009), Vol. 2, pp. 1204 f.

[102] Riḍā, *Tafsīr al-Manār*, Vol. 2, pp. 316 f.; Muḥammad ibn Isḥāq, *Al-Sīrah al-Nabawiyyah*, ed. ʿAbd al-Malik ibn Hishām, annotated by Fu'ād ibn ʿAlī Ḥāfiẓ (Beirut: Dār al-Kutub al-ʿIlmiyyah, 2000), Vol. 1, p. 235; A. Guillaume, trans. *The Life of Muhammad: A Translation of Isḥāq's Sīrat Rasūl Allāh* (Oxford: Oxford University Press, 1955), p. 145; Adil Salahi, *Muhammad Man and Prophet: A Complete Study of the Life of the Prophet of Islam* (Leicestershire: Islamic Foundation, 2002/1423), p. 132. Muhammad Hashim Kamali also notes that *fitnah* here refers to the persecution of the Muslims in Mecca to prevent them "from observing their faith", see Muhammad Hashim Kamali, *Freedom of Expression in Islam*, rev. ed. (Cambridge: Islamic Texts Society 1997), p. 192.

[103] See al-Qurṭubī, *Al-Jāmiʿ*, Vol. 2, p. 351; Abū Zahrah, *Zahrah al-Tafāsīr*, Vol. 1, p. 580.

[104] Al-Zamakhsharī, *Al-Kashshāf*, Vol. 1, p. 234; al-Nasafī, *Tafsīr al-Nasafī*, Vol. 1, p. 165.

[105] Oliver Leaman does not refer to *fitnah* in the sense of persecution and religious oppression mentioned in these texts. He refers to it only in the sense of "trial and discord". He states that *fitnah* "means that matters become confused, mistakes increase, and minds and intellects begin to waver". See Oliver Leaman, ed., "Fitna", *The Qur'ān: an Encyclopedia* (London: Routledge, 2006), pp. 209 f. On the meanings and types of *fitnah*, see, Kamali, *Freedom of Expression in Islam*, pp. 190-212. For a discussion of the concept of *fitnah* in al-Ṭabarī's exegesis, see Abdulkader Tayob, "An Analytical Survey of al-Ṭabarī's Exegesis of the Cultural Symbolic Construct of *Fitna*", in G.R. Hawting and Abdul-Kader A. Shareef, eds., *Approaches to the Qur'ān* (London: Routledge, 1993), pp. 157- 172.

fighting in the Sacred Month: say fighting therein is [a] grave [sin], and/but[106] debarring from God's way and unbelief in Him and the Sacred Mosque and expelling its people from it are/is graver [sin] in the sight of God; and *fitnah* is graver than killing; and they will continue to fight you until they turn you into renegades from your religion, if they can; whoever of you reneges from his religion and dies as a unbeliever, such are those whose actions become in vain in this world and the Hereafter, and they are the inmates of Fire; therein they eternally abide." (217)

The phrase "fighting has been enjoined on you" indicates the lifting of the prohibition of any militant response to the Meccans' aggression, which was in place during the Meccan period. But more importantly, the phrase "*fitnah* is graver than killing; and they will continue to fight you until they turn you into renegades from your religion" shows that the term *fitnah* indicates the religious persecution and torture of the Meccans, still a minority, who embraced the religion of Islam.[107] It adds that the Meccans were determined to continue their aggression against the Muslims until they recant their belief in Islam, even after their flight from Mecca.

In the chapter of the Qur'ān entitled "The Spoils of War", revealed after the battle of Badr (Ramaḍān 2/March 624), defensive war to liberate Muslims from the persecution of the unbelievers is reinforced as a *casus belli*. The text of Qur'ān 8:38-39 (below) indicates that the cessation of fighting is conditional upon the unbelievers' ending their persecution. However, some exegetes interpret it to mean that the cessation of fighting is conditional upon their ending their unbelief.

"Say to those unbelievers: if they *intahaūā* (cease), their past will be forgiven; but if they return (to fighting you) then there are already precedents

[106] Exegetes have different readings of this phrase; while some add it to the previous phrase, others consider it the beginning of a new locution.
[107] See Riḍā, *Tafsīr al-Manār*, Vol. 2, pp. 317 f.; Quṭb, *Ẓilāl*, Vol. 1, pp. 226 f.

> of earlier nations. (38) And fight them until there is no *fitnah* (persecution) and *yakūn al-dīn kulluh lillah* (religion is wholly for God); and if they *intahaūā* (cease), then indeed God is aware of what they are doing." (39)

The main point here is the explanations given to justify the command to fight the unbelievers "until there is no *fitnah* and *yakūn al-dīn kulluh lillah*". If *fitnah* means unbelief (in God), the Muslim addressees of this text are required to fight the unbelievers until unbelief is eradicated from Mecca and its surroundings, as interpreted by al-Rāzī, or from the rest of the world.[108] This means that jihād, according to this interpretation of *fitnah*, is an offensive war waged against non-Muslims because of their refusal to believe in Islam. But if *fitnah* is interpreted to mean the persecution of Muslims until they recant, Muslims are required to fight their persecutors until they enjoy complete freedom to worship God without fear or the need to hide their beliefs.[109] According to this interpretation, jihād is a defensive war justified as being necessary to protect Muslims from the religious persecution of their non-Muslim enemies.

During war, if the enemy decides to make peace, then the Qur'ān commands that peace be made. It reads: "And if they incline to peace, then incline to it; and put your trust in God, it is He who is the All-Hearing, the All-Knowing" (Qur'ān 8:61). Furthermore, a later revelation (Qur'ān 60:8-9) states clearly that God specifically forbids Muslims from entering into friendly relations or alliances with those who fight against Muslims because of their religious beliefs and expel them from their homes:

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[108] Muḥammad ibn ʿUmar al-Rāzī, *Al-Tafsīr al-Kabīr aw Mafātīḥ al-Ghayb* (Beirut: Dār al-Kutub al-ʿIlmiyyah, 2000/1421), Vol. 15, p. 131. See al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, pp. 257, 259-263.

[109] Al-Ṭabarī, *Jāmi' al-Bayān*, Vol. 9, pp. 248-250; al-Shawkānī, *Fatḥ al-Qadīr*, Vol. 2. p. 308; Riḍā, *Tafsīr al-Manār*, Vol. 9, pp. 665- 667; al-Marāghī, *Tafsīr al-Marāghī*, Vol. 9, pp. 207 f.; Abū Zahrah, *Zahrah al-Tafāsīr*, Vol. 6, pp. 3057, 3127 f.; Muhammad Hashim Kamali, "Issues in the Understanding of *Jihād* and *Ijtihād*", *Islamic Studies*, Vol. 41, No, 4, 2002/1423, p. 621.

> “God does not forbid you from dealing kindly and justly towards those who did not fight you because of your religion and did not expel you from your homes; verily God loves the just. (8) But God forbids you from allying with those who fought you because of your religion and expelled you from your homes and aided in your expulsion; and whoso allies with them, those are the wrongdoers.” (9)

However, exegetes give several interpretations of who is indicated in the phrase “those who did not fight you because of your religion”. Some exegetes maintain that it refers to particular tribes with whom the Prophet had secured non-aggression pacts, such as the tribes of Khuzāʿah and Banū al-Ḥārith, or a group from the tribe of Banū Hāshim. Others maintain that this verse refers to women and children, while yet others argue that it was revealed in relation to the mother of Asmā’, daughter of Abū Bakr or that it refers to the relatives of the Muslims in Mecca. It is also contended that it refers to non-combatants and the Meccans who did not oppress the Muslims and it is even believed by some that it refers to the Muslims who did not flee from Mecca. Al-Ṭabarī reports most of the above opinions and prefers the view that this phrase refers to all enemy non-combatants no matter what their religion or belief. He adds that it is not prohibited to enter into friendly relations with non-combatants from the enemy side, unless it is to the detriment of Muslims or strengthens the enemy combatants.[110]

These numerous interpretations exemplify the variety of ways in which the Qur’ān can be interpreted. Most of the exegetes simply refer to some of these diverse interpretations, while others advocate one of them in particular. However, the most

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[110] See al-Ṭabarī, *Jāmiʿ al-Bayān*, Vol. 28, pp. 65 f.; al-Qurṭubī, *Al-Jāmiʿ*, Vol. 18, p. 59; al-Rāzī, *Al-Tafsīr al-Kabīr*, Vol. 29, p. 263; al-Zamakhsharī, *Al-Kashshāf*, Vol. 4, p. 503; Ibn Kathīr, *Tafsīr*, Vol. 4, p. 350; al-Marāghī, *Tafsīr al-Marāghī*, Vol. 28, pp. 69 f. On al-Ṭabarī’s interpretation of verse 60: 8, see David Dakake, “The Myth of a Militant Islam”, in Aftab Ahmad Malik, ed., *The State We Are in: Identity, Terror and the Law of Jihad* (Bristol: Amal Press, 2006), pp. 62 f.

obvious difficulty in identifying the Qur'ānic justification for the recourse to war in the texts discussed above is the disagreement among the exegetes over the meaning of the term *fitnah*. The two interpretations of the term *fitnah* referred to above, i.e., the persecution of the Muslims to make them abandon Islam, or the unbelief of the pagans, give contradictory rulings on the justification for the recourse to war in the Qur'ān: if *fitnah* means the persecution of Muslims to make them abandon their belief in the religion of Islam, the Qur'ān justifies a defensive war to protect freedom of religion, but if *fitnah* means unbelief, the Qur'ān justifies offensive war against the Meccan unbelievers referred to in the above texts. Indeed, these different interpretations of the texts might lead to the formulation of different Islamic theories of war, depending on the way these verses are interpreted. It is worth adding here that the above texts have been considered in roughly chronological order, though any other ordering of the texts would not particularly change the Qur'ānic justifications for war.

In fact, the revelations that crucially formulated a position in the classical theory of war in Islam are Qur'ān 9:5 and 9:29, because these texts, dated to the year 9/631, are believed to be the last of the revelations regarding war and so, in accordance with the theory of abrogation, they contain the last divine statement on war in Islam.[111] Verse 9:5 addresses the relationship with the Meccan idolaters and 9:29 addresses the relationship with the People of the Book in relation to the incident of Tabūk.

The first twenty-eight verses of the same chapter address the relationship with the Meccan idolaters. The context of this revelation is that the Prophet did not perform the pilgrimage in that year because the Meccan idolaters used to

[111] See Bonner, *Jihad in Islamic History*, p. 26.

circumambulate the Kaʿbah naked. The Prophet therefore sent the first thirty or forty verses of this chapter to be proclaimed in the 9th day of the month of Dhū al-Ḥijjah/roughly 18 March 631, during the pilgrimage. These verses gave those Meccans who had no agreement with the Muslims four months, and those who had peace agreements with the Muslims, and had not broken their terms or supported others in attacks against the Muslims, until the end of the term of their agreement. Then the text reads:

> "When the Sacred Months have passed, kill the polytheists wherever you find them and capture them and besiege them and wait for them in every place of ambush; but if they repent and perform prayer and give the poor-due, then leave them their way; surely God is Oft-Forgiving, Oft-Merciful." (Qur'ān 9:5)

Exegetes differ on the meaning of the sacred months referred to in this verse: while some argue that it refers to the four established sacred months of the lunar calendar, others argue that it refers to a four-month period starting from the day of the proclamation of this text.[112] Although the preceding verse commands that the peace agreement with the idolaters be observed until the end of its term, and the same command is reinforced in a following verse (9:7), some exegetes hold that this verse refers to all the idolaters, while others maintain that it refers only to the Arab idolaters who have no peace agreements with the Muslims.[113] Still others hold that it

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[112] See, for example, al-Ṭabarī, *Jāmiʿ al-Bayān*, Vol. 10, p. 78; Ibn Kathīr, *Tafsīr*, Vol. 2, pp. 336 f.; al-Suyūṭī, *Al-Durr al-Manthūr*, Vol. 4, p. 131; al-Qurṭubī, *Al-Jāmiʿ*, Vol. 8, p. 72; al-Shawkānī, *Fatḥ al-Qadīr*, Vol. 2, p. 337; Riḍā, *Tafsīr al-Manār*, Vol. 10, pp. 197 f.; Abū Zahrah, *Zahrah al-Tafāsīr*, Vol. 6, p. 3231; Abdel Haleem, *The 'Sword Verse' Myth*, pp. 7 f.

[113] Riḍā, *Tafsīr al-Manār*, Vol. 10, pp. 200 f.; Aḥmad Maḥmūd Krīmah, *Al-Jihād fī al-Islām: Dirāsah Fiqhiyyah Muqāranah* (Cairo: Al-Dār al-Handasiyyah, 2003/1424), pp. 29-33. See also Rudolph Peters, "Djihad: War of Aggression or Defense?", in Albert Dietrich, ed., *Akten des VII. Kongresses Für Arabistik und Islamwissenschaft* (Göttingen, Aug. 1974) (Göttingen: Vandenhoeck & Ruprecht, 1976), pp. 286 f.; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, pp. 287 f.

refers only to the Meccan idolaters who violated the armistice of al-Ḥudaybiyah by killing some from the tribe of Khuzāʿah inside the Sacred Mosque.[114]

This text indicates that there should be a cessation of fighting if the idolaters "repent" and perform two Islamic obligations – performing the prayer and giving the poor-due. In contrast with the preceding texts, most exegetes interpret the word "repent" here to mean abandoning their unbelief, not ending their persecution of the Muslims.[115] While this interpretation indicates that the justification for fighting here is the unbelief, verse 9:12 makes fighting conditional upon the enemy's breaking of their agreement with the Muslims.[116] Riḍā points out that it is their unbelief that arouses their aggression against the Muslims.[117] He believes that the fighting after the passing of the sacred months referred to in this verse has resumed because the relationship between the Muslims and the idolaters has returned to the state of war that existed prior to the cessation of hostilities.[118]

Verse 9:7 denies the possibility of securing a peace agreement that would be honoured by the idolaters, except those with whom the Muslims concluded a peace agreement at the Sacred Mosque. Exegetes interpret this verse as a reference to the various tribes, such as Kenānah, Ḍamarah, Bakr, Quraysh, Juzaymah, Mudlaj and Khuzaymah[119] because they did not break their agreement with the Muslims. Muslims are therefore to fulfil their agreement with them as long as they abide by it,

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[114] Al-Ḥifnī, *Mawsūʾah al-Qur'ān*, Vol. 2, p. 1876; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, p. 244.

[115] See, for example, al-Suyūṭī, *Al-Durr al-Manthūr*, Vol. 4, p. 132; al-Qurṭubī, *Al-Jāmiʾ*, Vol. 8, p. 74; Naṣr ibn Muḥammad ibn Aḥmad Abū al-Layth al-Samarqandī, *Tafsīr al-Samarqandī al-Musammā Baḥr al-ʾUlūm*, ed. Maḥmūd Maṭrajī (Beirut: Dār al-Fikr, n.d.), Vol. 2, p. 40; al-Shawkānī, *Fatḥ al-Qadīr*, Vol. 2, pp. 337, 340.

[116] See Zahrān, *Al-Silm wa al-Ḥarb*, p. 42; Ṭabliyyah, *Al-Islām wa Ḥuqūq al-Insān*, p. 54; Troy S. Thomas, "Jihad's Captives: Prisoners of War in Islam", *U.S. Air Force Academy Journal of Legal Studies*, Vol. 12, 2003, pp. 90 f.

[117] Riḍā, *Tafsīr al-Manār*, Vol. 10, p. 201. See also al-Marāghī, *Tafsīr al-Marāghī*, Vol. 10, p. 58.

[118] Riḍā, *Tafsīr al-Manār*, Vol. 10, p. 198. See also al-Marāghī, *Tafsīr al-Marāghī*, Vol. 10, pp. 58, 61.

[119] See al-Suyūṭī, *Al-Durr al-Manthūr*, Vol. 4, p. 134; al-Qurṭubī, *Al-Jāmiʾ*, Vol. 8, p. 78; al-Samarqandī, *Baḥr al-ʾUlūm*, Vol. 2, p. 40; al-Shawkānī, *Fatḥ al-Qadīr*, Vol. 2, pp. 337-339; al-Marāghī, *Tafsīr al-Marāghī*, Vol. 10, p. 62; Abū Zahrah, *Zahrah al-Tafāsīr*, Vol. 6, pp. 3234 f.

though these tribes did not all become Muslims. However, it is argued that this so-called "sword verse" abrogates all the Qur'ānic revelations that prescribe any other form of relationship with idolaters.[120] It is worth adding here that scholars differ in identifying this "sword verse": most hold that it is 9:5, while others maintain that it is 9:29, 9:36 or 9:41.[121] In addition, exegetes differ concerning the number of texts that are abrogated by this verse, suggesting that the number of verses might be 70, 114, 124, 140, 145 or 200.[122] Those who consider that this verse abrogates all the other Qur'ānic injunctions on this issue have partly developed their theory of war in Islam on the basis of this view. Nevertheless, it is worth adding here that al-Ḍaḥḥāk, ʿAṭā' and al-Suddī argue that this verse is abrogated by verse 47:4, which commands the Muslims, after the cessation of fighting with the unbelievers, to "set them free either graciously or by ransom".[123] According to this position, the final Qur'ānic injunction concerning enemy idolaters is that they should be freed or exchanged for Muslim captives.

The verse addressing the campaign against Tabūk (9:29) formulates the classical theory of war with respect to the People of the Book. The exegetes' approach to this verse differs from the historians' approach to the incident to which it refers: while the biographers document the accounts of the event, most exegetes interpret the meaning of the text and the ordinances included in it without discussing the facts leading to this incident. This may lead to the misconception that the campaign against Tabūk was a *perlocutionary act* of this verse; though the historical

[120] David S. Powers, "The Exegetical Genre Nāsikh al-Qur'ān wa Mansūkhuhu", in Andrew Rippin, ed., *Approaches to the History of the Interpretation of the Qur'ān* (Oxford: Clarendon, 1988), pp. 130 f. For an excellent discussion of verse 9:5, see Abdel Haleem, *The 'Sword Verse' Myth*, pp. 1-34.
[121] Al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, pp. 268 f., 284-300.
[122] See, for example, al-Samarqandī, *Baḥr al-ʿUlūm*, Vol. 2, p. 39; Ibn al-Bārizī, *Nāsikh al-Qur'ān*, p. 22; Hibah Allah ibn Salāmah ibn Naṣr al-Maqrī, *Al-Nāsikh wa al-Mansūkh*, ed. Zuhayr al-Shāwīsh and Muḥammad Kanʿān (Beirut: Al-Maktab al-Islāmī, 1983-4/1404), p. 98; Abdel Haleem, *The 'Sword Verse' Myth*, p. 28; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, pp. 267 f.
[123] See al-Ṭabarī, *Jāmiʿ al-Bayān*, Vol. 10, pp. 80 f.; al-Qurṭubī, *Al-Jāmiʿ*, Vol. 8, p. 73.

reports maintained that the Muslim army marched to Tabūk to face the Byzantine army on its way to attack Medina, as indicated in the previous chapter. This verse thus addresses the context of a particular would be confrontation and the enemy are described in the verse. The enemy of the Muslims in this incident was not all the People of the Book, but a hostile group of them. Al-Qaraḍāwī adds that there is no justification for going to war against those, whether unbelievers or People of the Book, who are not hostile to Muslims.[124]

These two different approaches certainly affect the Islamic theory of war. While the historical reports explain this incident as a defensive act to stop the Byzantine advance from reaching Medina, the exegetical account could be misunderstood as a Qur'ānic injunction to launch a war against People of the Book, who are described as follows:

> "Fight those who do not believe in God, nor the Last Day, nor prohibit what God and His messenger prohibited, nor follow the religion of the truth, from among those who were given the scripture until they pay the *jizyah ʿan yad* (willingly) and they are *ṣāghirūn* (submissive to the Islamic rule)." (Qur'ān 9:29)

According to a classical Islamic theory described by Firestone as "the classical evolutionary theory of war", the Qur'ānic legislation on war developed in four stages: the first stage, "nonconfrontation", is based on revelations 15:94-95 and 16:125; the second stage, "defensive fighting", is based on revelations 22:39-40 and 2:190; the third stage, "initiating attacks allowed but within the ancient strictures", is

[124] Al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, pp. 296 f.

based on revelations 2:217 and 2:191; and the fourth stage, "unconditional command to fight all unbelievers", is based on revelations 2:216, 9:5 and 9:29.[125]

In fact, the texts attributed to the first stage do not relate to the issue of war: while verses 15:94-95 command the Prophet to preach the message he received and disregard the harassment of the Meccans, verse 16:125 describes the manner of preaching the religion. The formulation of this theory on the basis of these verses has no logical or even chronological basis in the Qur'ān and shows how texts can be quoted selectively to formulate theories on the Qur'ānic perception of war. The fact that two consecutive pairs of verses from the same chapter are selected to explain three stages of this so-called evolutionary theory indicates that these texts are invoked to support a theory rather than to illustrate the Qur'ānic position on war. It is irrational that verse 2:190 (stage two), supports defensive fighting and verse 2:191 (stage three), supports initiating limited attacks. Moreover, it is even more irrational that verse 2:216 (stage four), supports an unconditional command to fight all unbelievers, while verse 2:217 (third stage) supports limited attacks.

While this theory was developed two or three centuries after the emergence of Islam, jihād during the period covered in this study meant defence against religious persecution and aggression against Muslims. Over the last three centuries, jihād has meant the liberation of almost all the Muslim world from European occupation. The repercussions of the Western colonization of the Muslim world on contemporary Islamic thought and the political situation in the Muslim world are totally ignored in Western scholarship. This crucial period of Islamic history witnessed the Anglo-French "fragmentation" of the Muslim world and the creation of Muslim countries under new names. In this context, Abū al-Aʿlā al-Mawdūdī (1903-

[125] See Firestone, *Jihād*, pp. 50-65; Firestone, "Disparity and Resolution in the Qur'ānic Teachings on War", pp. 4-17. See also Freamon, "Martyrdom, Suicide, and the Islamic Law of War", pp. 314 f.

1979) introduced a new conception of jihād as a revolutionary struggle aimed at implementing the Islamic principles of fairness and justice in place of unjust systems.[126]

Although Quṭb states that jihād is only permitted to defend the religion of Islam and protect its laws,[127] he adopts al-Mawdūdī's conception of jihād and advocates that it is not only defensive.[128] It aims to abolish the "oppressive political systems under which people are prevented from expressing their freedom to choose whatever beliefs they want, and after that it gives the complete freedom to decide whether to accept Islam or not".[129] However, this conception of jihād as "a permanent revolution"[130] is often mistakenly attributed to Quṭb rather than to its originator, al-Mawdūdī.

### 2.7 Conclusion

The Qur'ānic texts on war indicate that the Qur'ānic justification for war is the defence or protection of freedom of religion. The aggressors or oppressors of Muslims are identified in the Qur'ān by their religious beliefs, i.e., the *kuffār*, *mushrikūn* and *ahl al-kitāb*. This identification of the warring parties according to their religious beliefs, let alone the persecution of the Muslims because of their new religious beliefs and their flight from Mecca, may lead to the misconception that the warring parties were fighting holy wars in the sense that each was fighting for the

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[126] See Quṭb, *Ẓilāl*, Vol. 3, pp. 1446 f.
[127] Ibid., Vol. 1, p. 187.
[128] Ibid., Vol. 3, pp. 1432 f. On Mawdūdī's influence on modern Islamic thinking in the Arab world see, Fathi Osman, "Mawdūdī's Contribution to the Development of Modern Islamic Thinking in the Arabic-Speaking world", *The Muslim World*, Vol. 93, No. 3 & 4, July/October 2003, pp. 465-485.
[129] Sayyid Quṭb, *Milestones*, rev. trans. with a foreword by Ahmed Zaki Hammad (Indianapolis: American Trust Publication, 1993), p. 46.
[130] See, for example, Fawaz A. Gerges, *The Far Enemy: Why Jihad Went Global* (Cambridge: Cambridge University Press, 2005), p. 4.

propagation of their religion. However, the Meccan idolaters' hostility was initially motivated by economic and political causes, as well as by religion.

Reading the Qur'ānic texts on war in their contexts requires facing the problem of reconstructing the details of the warring incidents addressed in these texts, which are needed if the nature of this particular conflict is to be identified. That is to say, identifying the nature of wars between the Muslims and their enemies during the Prophet's lifetime necessitates studying both the incidents themselves and the relevant Qur'ānic texts. The various interpretations of the Qur'ānic texts and the use of the exegetical disciplines for the study of the Qur'ān can produce different conclusions on the Islamic position on war. Thus, Donner points out that determining whether the Qur'ān sanctions only defensive war or offensive war too "is really left to the judgement of the exegete".[131]

The diverse interpretations show that there is a lack of clarity between aggression and *kufr*/*shirk* (unbelief/polytheism) as the Qur'ānic *casus belli*. While the Meccan oppression of the Muslims was a corollary of the Meccan idolaters' unbelief, it is crucial to find out exactly what were the Qur'ānic justifications for war against oppressive polytheists. Examination of the incidents of war that took place between the Muslims and their enemies during the lifetime of the Prophet, i.e., the period of the revelation of the Qur'ān, shows that no act of hostility was initiated by the Muslims against an enemy simply because of the latter's religious beliefs. However, exegetes, as explained above, give a variety of interpretations of the Qur'ānic justification for war. For example, while the concept of *fitnah* in the *locutionary act* "fight them until there is no *fitnah*" is interpreted by some as referring to oppression and persecution of Muslims because of their beliefs, others

[131] Donner, "The Sources of Islamic Conception of War", p. 47.

interpret it to mean unbelief, and still others consider that the oppression is a result of the enemy's unbelief.

These divergent interpretations produce widely differing understandings of the Islamic *casus belli* and indeed have given rise to diverse positions on the Islamic attitudes towards peace and war with others. More importantly, of the Qur'ānic disciplines discussed above, the theory of abrogation, by which it is claimed that verses 9:5 and 9:29 abrogated all the earlier Qur'ānic texts on relations with the idolaters and the People of the Book, also shaped a position in the Islamic classical juridical theory of war.

Contemporary Muslim scholars clarify the distinction between unbelief and aggression as *casus belli*. Regarding religious beliefs, they emphasise the Qur'ānic principle that "there is no compulsion in religion".[132] Shaltūt states that there is not a single verse in the Qur'ān that justifies war to bring about conversion to Islam, otherwise *jizyah* would not have been accepted from non-Muslims.[133] He explains that the Islamic *casus belli* are the prevention of aggression and religious persecution, and so fighting must cease once religious freedom is secured, and the mission to preach Islam is protected.[134] Shaltūt reiterates the same three *casus belli*

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[132] Qur'ān 2:256. See, for example, Ṭanṭāwī, "Al-Ḥukm al-Sharʿī fī Aḥdāth al-Khalīj", pp. 65 f.; ʿAbd al-ʿAzīz ibn ʿAbd Allah ibn Muḥammad Āl al-Shaykh, "Al-Irhāb: Asbābuh wa Wasā'il al-ʿIlāj", *The Islamic Fiqh Council Journal*, Issue No. 17, 2004/1425, pp. 43 f.; Dakake, "The Myth of a Militant Islam", pp. 69-72; Gawrych, "Jihad, War, and Terrorism", p. 4; Adam L. Silverman, "Just War, Jihad, and Terrorism: A Comparison of Western and Islamic Norms for the Use of Political Violence", *Journal of Church and State*, Vol. 44, 2002, p. 79.

[133] Shaltūt, *Al-Islām wa al-ʿAlāqāt al-Dawliyyah*, p. 37; Peters, trans. and ed., *Jihad in Mediaeval and Modern Islam*, pp. 49 f.; see also Abdel Haleem, *Understanding the Qur'ān*, p. 61; Badawi, "Muslim/Non-Muslim Relations", p. 271; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, pp. 299, 381.

[134] Shaltūt, *Al-Islām wa al-ʿAlāqāt al-Dawliyyah*, p. 38; Peters, trans. and ed., *Jihad in Mediaeval and Modern Islam*, pp. 45, 51; Riḍā, *Tafsīr al-Manār*, Vol. 2, pp. 215, 316; ʿAbd al-Ḥalīm Maḥmūd, "Al-Jihād", *Kitāb al-Mu'tamar al-Rābiʿ li-Majmaʿ al-Buḥūth al-Islāmiyyah* (Cairo: Majmaʿ al-Buḥūth al-Islāmiyyah, 1968/1388), p. 36; Fayyāḍ, "Al-Siyāsah al-Khārijiyyah lil-Islām", pp. 204, 206; Afīfī, *Al-Mujtamaʿ al-Islāmī*, pp. 149-151; al-Faruqi, "Islam and Other Faiths", p. 100; ʿAbd al-Salām Bilājī, "Sharīʿah al-Ḥarb fī al-Sīrah al-Nabawiyyah al-Sharīfah", in Fārūq Ḥamādah, ed., *Al-Tashrīʿ Al-Dawlī fī Al-Islām*, Nadawāt wa Munāẓarāt, No. 70 (Rabat: Kulliyyah al-Ādāb wa al-ʿUlūm al-Insāniyyah, 1997), pp. 116-118; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, pp. 54 f., 241, 256, 289, 430-435; Youssef H. Aboul-Enein and Sherifa Zuhur, "Islamic Rulings on Warfare", [article online]; available

as those set out by Ibn Taymiyyah (d. 728/1328) in the fourteenth century. Riḍā adds that if preachers are killed or prevented from preaching, Muslims should go to war to protect the mission to preach Islam. Furthermore, he also advises that Muslims should flee any country where they suffer from *fitnah* (religious persecution) because of their beliefs, or if they cannot express their beliefs freely, even if such a country is ruled by Muslims.

Thus, the Islamic justifications for war are closely linked to, and based on, the religion of Islam, but apart from defence against military aggression, the religious persecution of Muslims and the need to secure freedom of religion, there is no text in the Qur'ān that supports force of arms, let alone for the purpose of compelling others to accept Islam. Even those who interpret the unbelief of the idolaters as the justification for fighting them say this action was meant to be restricted to the male idolaters of Quraysh, according to Malik, or of Arabia, according to Abū Ḥanīfah.[135] This is why *jizyah* is accepted from non-Arab idolaters. This distinction between Arab and non-Arab idolaters proves that the justification for war here is the aggression, not the religious beliefs per se. Also, with reference to verse 9:29, even if the justification for fighting the People of the Book is interpreted as arising from their beliefs and not to the fact that the Byzantines were on their way to attack the Muslims associated with this incident, Islam guarantees their religious freedom and defends them against foreign aggression in return for the payment of the *jizyah* to the Muslim authorities, which also proves that conversion was not the intention here, but the subjection of the Byzantines to the authority of the Islamic state.

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from http://www.strategicstudiesinstitute.army.mil/pubs/display.cfm?pubID=588; Internet; accessed 21 April 2009, p. 11.

[135] ʿAlī ibn Muḥammad ibn Ḥabīb al-Māwardī, *Al-Ḥāwī al-Kabīr: Fī Fiqh Madhhab al-Imām al-Shāfiʿī Raḍī Allah ʿanh wa huwa Sharḥ Mukhtaṣar al-Muznī*, ed. ʿAlī Muḥammad Muʿawwaḍ and ʿĀdil Aḥmad ʿAbd al-Mawjūd (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1999), Vol. 14, p. 153; Rudolph Peters, *Islam and Colonialism: The Doctrine of Jihad in Modern History* (The Hague: Mouton, 1979), p. 36.

Whether jihād is purely defensive or, as Quṭb has it, offensively defensive, it aims to establish what is deemed by Muslims to be a just cause. However, the determination of whether a cause is just has varied throughout history according to the circumstances. Since the traditional hostility to those belonging to different religions is no longer considered a motive for enmity,[136] and after the agreement of the member states of the United Nations, as stipulated in Article One of the UN Charter, to "maintain international peace" and to settle disputes according to International Law,[137] no justification is left for any form of war if member states abide by the dictates of international law. At present, the religious freedom of Muslims is more secure in some non-Muslim countries than in a few Muslim countries, transforming the classical paradigm of Muslims versus non-Muslims. Thus in the light of the above discussion and the contemporary world situation, it can be concluded that the Qur'ānic justifications for recourse to war remain aggression and religious persecution, irrespective of the oppressor's religion.

[136] See Karl-Wolfgang Tröger, "Peace and Islam: In History and Practice", *Islam and Christian-Muslim Relations*, Vol. 1, No. 1, 1990, p. 20.
[137] United Nations, *Charter of the United Nations and Statute of the International Court of Justice* (Geneva: United Nations, reprint, 1997), p. 5.

# CHAPTER THREE

# JURIDICAL JUSTIFICATIONS FOR WAR

## 3.1 Introduction

The outbreaks of hostilities between the Muslims and their enemies in Medina during the Prophet's lifetime and the different interpretations of the Qur'ānic *casus belli*, studied in Chapters One and Two above respectively, were the basis on which the jurists of the second/eighth and third/ninth centuries developed the Islamic law of war. This chapter studies the justifications for war and Islamic attitudes towards non-Muslims in the classical Islamic juridical theory of international law and modern Islamic writings on the issue. It also examines how the Islamic justifications for war in classical and modern writings are presented in Western literature. The significance of studying how the Islamic justifications for war are dealt with in Western literature is that it indicates how Western scholars and policy makers view the nature of conflicts where Islam plays, or is thought to play, a role.

The area of Islamic international law is part of the science of *fiqh* (Islamic jurisprudence) dealt with in the literature under various headings such as *Siyar*, *Jihād*, *Maghāzī* (campaigns) and *Amān* (safe conduct). *Fiqh* covers seven main areas: (1) acts of worship; (2) family law; (3) financial transactions; (4) governance; (5) criminal law; (6) morality and (7) international law. The major but very common error in Western scholarship in the area of Islamic international law is the confusion between sharīʿah and *fiqh*. Apart from the diverse assessments of the historical instances of war during the Prophet's lifetime, and the various interpretations of the Qur'ānic texts on war, confusing sharīʿah with *fiqh*, has made the area of Islamic international law in Western literature the most blatant area of conflict between Islamic/insider and Western/outsider scholarship. Moreover, the Islamic law of war

was formulated by individual jurist-scholars according to their differing interpretations of the sharīʿah texts and their use of exegetical disciplines and juridical methodologies. No less importantly, as John L. Esposito points out, this formulation of the tradition of war in Islam occurred "in specific historical and political contexts."[1] The failure to take into consideration the nature of the formulation of the Islamic law of war and to relate it to specific periods in history and the paradigm of international relations during which it emerged, explains much of the confusion about the justifications for war in Islam. Thus, this chapter argues that, in the absence of a codification of applicable Islamic law of war by a body of international Muslim jurist-scholars, much of the confusion about the justifications for war in Islam, and the nature of jihād in general, will remain.

### 3.2 Sharīʿah or *Fiqh*

Sharīʿah is defined as the set of laws given by God to His messengers.[2] Thus, Islamic sharīʿah is confined to the laws given in the Qur'ān, as the revealed word of God, and in the Sunnah/Ḥadīth of the Prophet, by virtue of some of his acts being divinely inspired. Therefore, sharīʿah "contained in God's revelation ([Q]ur'ān and *ḥadīth*), is

[1] John L. Esposito, *Unholy War: Terror in the Name of Islam* (Oxford: Oxford University Press, 2002), p. 64.

[2] See H. Hamid Hassan, *An Introduction to the Study of Islamic Law* (New Delhi: Adam Publishers & Distributors, 2005), p. 3; ʿAbdulḤamid A. AbuSulayman, *Towards an Islamic Theory of International Relations: New Directions for Methodology and Thought*, 2nd & rev. ed. (Herndon, VA: International Institute of Islamic Thought, 1993/1414), p. 2; Muḥammad Ṭalaat al-Ghunaimi, *The Muslim Conception of International Law and the Western Approach* (The Hague: Martinus Nijhoff, 1968), p. 106; N. Calder, "Sharīʿa", *Encyclopaedia of Islam*, new ed., Vol. IX, p. 322; ʿAbbās Ḥusnī Muḥammad, *Al-Fiqh al-Islāmī: Āfāquh wa Taṭawwuruh*, Daʿwah al-Ḥaq, Issue 10 October/November 1981/Muḥarram 1402, 2nd ed. (Mecca: Muslim World League, 1993-4/1414), pp. 7-11; Ḥamdī ʿAbd al-Munʿim Shalabī, *Fiqh al-ʿIbādāt* (Damanhur: Behera Press, 2003/1424), p. 5; Muḥammad al-Disūqī, *Al-Tajdīd fī al-Fiqh al-Islāmī* (Beirut: Dār al-Madār al-Islāmī, 2006), pp. 20-23; ʿAbdur Raḥmān I. Doi, *Sharīʿah: The Islamic Law* (London: Ta Ha Publishers, 1984/1404), pp. 2-6; Irshad Abdal-Haqq, "Islamic Law: An Overview of its Origin and Elements", *Journal of Islamic Law and Culture*, Vol. 7, Issue 1, Spring/Summer 2002, pp. 33-36.

explained and elaborated by the interpretative activity of scholars, masters of *fi*[*q*]*h*, the *fu*[*q*]*ahā'*",[3] i.e., the jurists.

The word *fiqh* literally means "understanding". Hence, the science of *fiqh* is defined as "the practical rules derived by the *mujtahids* (independent legal thinkers) from particular sources or proofs."[4] This means that, in this "academic discipline",[5] jurists, on the one hand, attempt to discover, understand,[6] explore, describe, explain, elaborate, interpret[7] and derive[8] the rules of the sharīʿah and, on the other, exercise their independent reasoning and judgement to formulate Islamic rules for all contemporary, practical activities. In the words of Kamali, *fiqh* "is a product largely of the juristic interpretation of scholars and their understanding of the general guidance of *waḥy* [revelation]".[9]

In the process of making Islamic rules, jurists refer to (1) the Qur'ān, (2) the Sunnah and (3) *ijmāʿ* (consensus of opinion),[10] that is, the primary sources of Islamic law. If they do not find specific guidance in these sources, they exercise their own

[3] Calder, "Sharīʿa", p. 322.

[4] Hassan, *An Introduction to the Study of Islamic Law*, p. 1. See also Ann K.S. Lambton, *State and Government in Medieval Islam: An Introduction to the Study of Islamic Political Theory: The Jurists*, London Oriental Series Vol. 36 (Oxford: Oxford University Press, 1981), p. 4; Mohammad Hashim Kamali, "*Fiqh* and Adaptation to Social Reality", *The Muslim World*, Vol. LXXXVI, No. 1, January, 1996, p. 62; Shalabī, *Fiqh al-ʿIbādāt*, pp. 9 f.; Ṣubḥī al-Ṣāliḥī, *Maʿālim al-Sharīʿah al-Islāmiyyah* (Beirut: Dār al-ʿIlm lil-Malāyyn, 1975), p. 13; Muḥammad Muṣṭafā Shalabī, *Al-Fiqh al-Islāmī bayn al-Mithaliyyah wa al-Waqiʿiyyah* (Beirut: Al-Dār al-Jāmiʿiyyah, 1982), p. 112; Muḥammad, *Al-Fiqh al-Islāmī*, pp. 31-36, 208; al-Disūqī, *Al-Tajdīd fī al-Fiqh al-Islāmī*, p. 16; Abdal-Haqq, "Islamic Law", pp. 36-39; Robert D. Crane, "The Essence of Islamic Law", *The Journal of Islamic law*, Vol. 3, Fall/Winter, 1998, p. 186.

[5] Calder, "Sharīʿa", p. 322.

[6] Al-Ghunaimi, *The Muslim Conception*, p. 106.

[7] Calder, "Sharīʿa", p. 322.

[8] Bernard Weiss, "Interpretation in Islamic Law: The theory of Ijtihād", *American Journal of Comparative Law*, Vol. 26, No. 2, 1978, pp. 199 f.

[9] Kamali, "*Fiqh* and Adaptation to Social Reality", p. 64.

[10] See, on *ijmāʿ*, for example, A.M. Naqeshbandi, "The Doctrine of Consensus (Ijmāʿ) in Islamic Law" (PhD thesis, The Faculty of Law, University of London, 1958); Ahmad Hasan, *The Doctrine of Ijmāʿ in Islam*, 2nd reprint (Islamabad: Islamic Research Institute, 1991); Lambton, *State and Government in Medieval Islam*, pp. 10-12; Mahdi Zahraa, "Unique Islamic Law Methodology and the Validity of Modern Legal and Social Science Research Methods for Islamic Research", *Arab Law Quarterly*, Vol. 18, No. 3/4, 2003, pp. 234-236; ʿAbd al-Karīm Zīdān, *Al-Wajīz fī Uṣūl al-Fiqh*, 5th ed. (Beirut: Mu'assasah al-Risālah, 1996/1417), pp. 179-193; ʿAbd al-Wahhāb Khallāf, *ʿIlm Uṣūl al-Fiqh* (Cairo: Dār al-Ḥadīth, 2003/1423), pp. 50-58; Muḥammad Ṭalaat al-Ghunaimi, *Qānūn al-Salām fī al-Islām* (Alexandria, Egypt: Munsha'ah al-Maʿārif, 2007), pp. 155-167.

*ijtihād* (reasoning or judgement in making laws).[11] Here, jurists have developed a number of methods and methodologies for applying what are called secondary sources: (4) *qiyās* (analogy); (5) *istiḥsān* (juristic/public preference); (6) *maṣāliḥ mursalah* (public interest); (7) *sadd al-dharā'iʹ* (blocking the means, that is, preventing the occurrence of something evil, though it also extends to include facilitating the occurrence of something good); (8) *sharʹ man qablanā* (sharīʿahs of religions before Islam); (9) *qawl al-ṣaḥābī* (i.e., the opinions of the Companions of the Prophet); (10) *ʹurf* (custom) and (11) *istiṣḥāb* (the continuation of the applicability of a rule which was accepted in the past, unless new evidence supports a change in its applicability).[12]

Thus, in the words of N. Calder, *fiqh* "designates a human activity, and cannot be ascribed to God or (usually) the Prophet."[13] Indeed, *fiqh*, as insightfully observed by Schacht, is "the interpretation of a religious ideal not by legislators but by scholars, and the recognized handbooks of the several schools are not 'codes' in the Western meaning of the term. Islamic law is a 'jurists' law' par excellence: Islamic jurisprudence did not grow out of an existing law, it itself created it."[14] Therefore, Islamic law uniquely developed as an accumulation of scholarly

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[11] See Wael B. Hallaq, "Was the Gate of Ijtihād Closed?", *International Journal of Middle Eastern Studies*, Vol. 16, No. 1, Mar. 1984, pp. 3 f.

[12] See, for example, ʿAbd al-Wahhāb Khallāf, *Maṣādir al-Tashrīʹ al-Islāmī fīmā lā Naṣṣ fīh*, 6th ed. (Kuwait: Dār al-Qalam, 1993/1414), pp. 19-176; Hassan, *An Introduction to the Study of Islamic Law*, pp. 138-243; Muhammad Hashim Kamali, *Principles of Islamic Jurisprudence*, 3rd rev. & enl. ed. (Cambridge: Islamic Texts Society, 2003), pp. 16-409; Zahraa, "Unique Islamic Law Methodology", pp. 236-248; Doi, *Sharīʹah: The Islamic Law*, pp. 21-84; Shalabī, *Al-Fiqh al-Islāmī*, pp. 115-206; Abdal-Haqq, "Islamic Law", pp. 54-58.

[13] Calder, "Sharīʿa", p. 322.

[14] Joseph Schacht, "Fiḳh", *Encyclopaedia of Islam*, New ed., Vol. II, p. 891. See also Joseph Schacht, "Problems of Modern Islamic Legislation", *Studia Islamica*, No. 12, 1960, pp. 108, 110; Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarenon Press, 1964, reprint 1996), p. 5; G.M. Badr, "A Survey of Islamic International Law", *Proceedings of the American Society of International Law*, Vol. 76, 1982, p. 56; Ann Elizabeth Mayer, "The Sharīʿah: A Methodology or a Body of Substantive Rules?", in Nicholas Heer, ed., *Islamic Law and Jurisprudence* (Seattle: University of Washington Press, 1990), pp. 177-198; Sherman A. Jackson, "Domestic Terrorism in the Islamic Legal Tradition", *The Muslim World*, Vol. 91, Issue 3-4, September 2001, p. 294; Sherman A. Jackson, "Jihad and the Modern World", *Journal of Islamic Law and Culture*, Vol. 7, No. 1, 2002, p. 3.

contributions by individual jurists who did or did not belong to different, equally authoritative schools of law (*madhāhib*, sing. *madhhab*) and thus it was not created by the Islamic state.[15] The emergence of several schools of law, some of which survive to the present day, and the formulation and adoption of diverse rules, testify to this fact. But it was left for the Islamic state and judges, as well as to individual Muslims, in the various parts of the Muslim world throughout history, to follow a certain school of law or to select rules from more than one school and from the contributions of a number of jurists.

One of the reasons for the confusion in the current literature on the Islamic law of war is that it makes no distinction between the laws that are part of the sharīʿah and the laws based on an interpretation of the sharīʿah, or the set of laws that are purely the jurists' judgements based on juridical methodologies or made in accordance with the interests of the circumstances of the Islamic state at the time. The significance of the simple, but crucial, mistake of confusing sharīʿah with *fiqh* is that it turns the individual contributions of the jurists of certain periods and historical circumstances, who developed the body of Islamic rules that govern relations with non-Muslims, into an allegedly sacred and unchangeable sharīʿah, i.e., divine law, as

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[15] According to the words of Sherman A. Jackson, "Islamic law represents what some scholars have referred to as an extreme case of 'jurists' law.' Being neither the product nor the preserve of the early Islamic state, it developed in conscious opposition to the latter. Private Muslims in pious devotion to the study of scripture, during the first two centuries of Islam, succeeded in gaining the community's recognition for their interpretive efforts as constituting the most authentic representation of divine intent." See Jackson, "Domestic Terrorism in the Islamic Legal Tradition", p. 294. It is also worth quoting here Muhammad Abdel Haleem who explains that "Any opinions arrived at by individual scholars or schools of Islamic law, including the recognised four Sunni schools, are no more than opinions. The founders of these schools never laid exclusive claim to the truth, or invited people to follow them rather than any other scholars. Western writers often take the views of this or that classical or modern Muslim writer as 'the Islamic view', presumably on the basis of assumptions drawn from the Christian tradition, where the views of people like St Augustine or St Thomas Aquinas are often cited as authorities." See Muhammad Abdel Haleem, *Understanding the Qur'ān: Themes and Style* (London: Tauris, 1999), p. 59. See also David Bonderman, "Modernization and Changing Perceptions of Islamic Law", *Harvard Law Review*, Vol. 81, No. 6, April, 1968, p. 1174; Abdullahi Ahmed An-Naʿim, "Sharīʿa in the Secular State: A Paradox of Separation and Conflation", in Peri Bearman, Wolfhart Heinrichs and Bernard G. Weiss, eds., *The Law Applied: Contextualizing the Islamic Sharīʿa, A Volume in Honor of Frank E. Vogel* (London: I.B. Tauris, 2008), pp. 325 f.

if this were the Muslim position. Thus, Irshad Abdal-Haqq rightly warns that "designating [*fiqh*] as part of the Shariʿah, per se, certainly blurs the line between the infallibility of revealed knowledge (Qur'ān) and its demonstration by Muhammad (Sunnah), [i.e., Sharīʿah] and fallible attempts by man to infer, deduce and apply the principles of revealed knowledge through ijtihad or otherwise [i.e., *fiqh*]."[16] This stark contradiction and confusion could have been avoided to a great extent if Schacht's observation that the jurists' interpretations and rules are scholarly judgements, not "codes" in the Western sense, had been taken into consideration. Unfortunately, that has not been the case.

To give a few examples of this confusion in the writings of two renowned scholars, Majid Khadduri (1909-2007) repeatedly refers to *siyar* (the classical juridical theory of international law) as "part of the sharīʿa[h]"[17] or "an extension of the sacred law, the sharīʿa[h]".[18] He confirms that *siyar* "was the sharīʿa[h] writ large."[19] He even adds that, because of his extensive writing on *siyar*, "Shaybānī made a contribution to the sharīʿa[h]".[20] Nevertheless, Khadduri contradicts this statement twice. First, he says: "The classical theory of Islamic law of nations is found neither in the Qur'ān nor in the Prophet's utterances, though its basic assumptions were derived from these authoritative sources; it was rather the product of Islamic juridical speculation at the height of Islamic power."[21] And in addition

[16] Abdal-Haqq, "Islamic Law", p. 37. On al-Mawdūdī's warning of the confusion between sharīʿah with *fiqh*, see Anis Ahmad, "Mawdūdī's Conception of *Sharīʿah*", *The Muslim World*, Vol. 93, No. 3 & 4, July/ October, 2003, p. 540.
[17] Majid Khadduri, *War and Peace in the Law of Islam* (Baltimore, MD.: Johns Hopkins University Press, 1955), p. 47.
[18] Majid Khadduri, trans., *The Islamic Law of Nations: Shaybānī's Siyar* (Baltimore, MD.: Johns Hopkins Press, 1966), p. 6.
[19] Ibid.
[20] Ibid., p. 56.
[21] Ibid., p. 19. This statement is almost worded the same as follows: "The Islamic theory of international relations is to be found neither in the Qur'ān nor in the Prophet Muḥammad's utterances, though its basic assumptions were derived from these authoritative sources. It was rather the product of Muslim speculation at a time when the Islamic Empire had reached its full development", see

Khadduri indicates that the rules of Islamic international law consist of the formulations of the Islamic state's relations with non-Muslim states, including treaties, official decrees of Muslim leaders and the opinions of jurists. This leads him to conclude that the sources of Islamic international law "conform to the same categories defined by modern jurists and [identified in Article 38 of] the Statute of the International Court of Justice, namely, agreement, custom, reason, and authority".[22] Since these methods of formulating the basic theory of international law inevitably lead to changes in the law because of the changes in international society arising from states of peace and war, Khadduri indicates that such modifications were "derived not from religious doctrine but from common interest".[23] Thus, Mahdi Zahraa rightly states that *siyar* "is not *ab initio* representative of Islamic law, but rather is a collection of views and opinions that should be assessed in the light of the *Qur'ān*, the *Sunnah* and the contingencies of time and place."[24]

Another typical example of this confusion in the study of "war and peace" in Islam is the following statement by Bernard Lewis: "The *sharīʻa*[h] is simply the law*, and there is no other* [emphasis added]. It is holy in that it derives from God, and is the external and unchangeable expression of God's commandments to

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Majid Khadduri, "The Islamic Theory of International Relations and Its Contemporary Relevance", in J. Harris Proctor, ed., *Islam and International Relations* (London: Pall Mall Press, 1965), p. 29.

[22] Khadduri, *War and Peace*, pp. 47 f. See also Ali Raza Naqvi, "Laws of War in Islam", *Islamic Studies*, Vol. XIII, No. 1, March 1974, p. 26; Syed Sharifuddin Pirzada, "Islam and International Law", in Altaf Gauhar, ed., *The Challenge of Islam* (London: Islamic Council of Europe, 1978), p. 199; Seif Ahmed El-Wady Romahi, *Studies in International Law and Diplomatic Practice: With Introduction to Islamic Law* (Tokyo: Data Labo Inc., 1980), p. 49; Karima Bennoune, "As-Salāmū ʻAlaykum? Humanitarian Law in Islamic Jurisprudence", *Michigan Journal of International Law*, Vol. 15, Winter 1994, pp. 613 f.; Hilmi M. Zawati, "Just War, Peace and Human Rights under Islamic and International Law" (M.A. thesis, McGill University, 1997), p. 7; Yassin El-Ayouty, "International Terrorism under the Law", *ILSA Journal of International & Comparative Law*, Vol. 5, 1999, p. 488; Troy S. Thomas, "Jihad's Captives: Prisoners of War in Islam", *U.S. Air Force Academy Journal of Legal Studies*, Vol. 12, 2003, p. 89.

[23] Khadduri, "The Islamic Theory of International Relations and Its Contemporary Relevance", p. 33.

[24] Mahdi Zahraa, "Characteristic Features of Islamic Law: Perceptions and Misconceptions", *Arab Law Quarterly*, Vol. 15, No. 2, 2000, p. 191.

mankind."[25] In the next sentence, he discusses what he calls "holy war", referring to jihād, which for him is a war commanded by the Islamic faith "to convert or at least to subjugate those who have not [been converted]."[26] Until Muslims fulfil this obligation, he adds, the world is divided in two: the house of Islam (*dār al-Islām*) and the house of war (*dār al-ḥarb*).[27] Therefore, according to Lewis' definitions of sharīʿah and jihād, and it is to be noted that he ignores here the third division, namely, the house of peace (*dār al-ṣulḥ*) or the house of covenant (*dār al-ʿahd*),[28] non-Muslims will be the permanent target of Muslim aggression.

Moreover, Lewis' remark in his definition of sharīʿah as "simply the law, and there is no other", ignores the whole process of Islamic legislation, and the eleven sources of law referred to above. While these sources include divine laws, as given in the Qur'ān or the Prophet's Sunnah, it also includes, among other sources, the consensus of opinion of the jurists/the nation,[29] analogy, custom, the public interest of the nation, and even the divine laws of both Judaism and Christianity, etc. In other words, it includes almost all the possible sources for any legal system.

Here Lewis mistakes sharīʿah for *fiqh*, the main body of Islamic law. For example, while he is right in referring to sharīʿah as derived from God, as Muslim scholars define it, it is not clear how he would then reconcile this with another of his definitions of sharīʿah as: "the Holy Law, which deals extensively with the acquisition and exercise of power, the nature of legitimacy and authority, the duties

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[25] Bernard Lewis, *The Political Language of Islam* (Chicago: University of Chicago Press, 1988), p. 72.

[26] Ibid., p. 73. See also Lambton, *State and Government in Medieval Islam*, p. 201.

[27] Lewis, *The Political Language of Islam*, p. 73; see also his *The Crisis of Islam: Holy War and Unholy Terror* (New York: The Modern Library, 2003), p. 31.

[28] In page 80 of his *The Political Language of Islam*, Lewis says: "Some-by no means all-jurists even recognize an intermediate zone", and in page 42 of his *The Crisis of Islam*, he says: "In certain periods, jurists recognized an intermediate status".

[29] Some Scholars argue that the consensus refers to the consensus of opinions of the Muslim scholars and others restrict it to the *mujtahids*, although maintain that it refers to the consensus of *ahl al-ḥall wa al-ʿaqd* (the body of those who bind and loose). However, al-Ghunaimi argues that it means the consensus of the whole *ummah*, see al-Ghunaimi, *Qānūn al-Salām fī al-Islām*, pp. 156-165.

of ruler and subject, in a word, with what we in the West would call constitutional law and political philosophy."[30] This unreasonable claim that God deals extensively with all these matters of constitutional and political philosophy shows the extent of his misunderstanding of the basics of Islamic law.

In fact, Islamic jurisprudence is the culmination of Islamic thought[31] in matters relating to the practical aspects of religious, economic, civil and political issues. It reflects the religious, legal, moral and ethical thought of Muslims throughout history.[32] Nonetheless, it does not necessarily reflect the full reality of Muslim history. More importantly here, although different approaches have been taken to the discussion of particular aspects of war in various Islamic genres, such as the *Sīrah*, *Tafsīr*, *Ḥadīth* and historical literatures, it is the classical Muslim jurists who developed the formulation of the law of war in Islam. Therefore, as Hashmi rightly points, it is *fiqh* that "has historically defined Muslim discourse on war and peace."[33] However, writing in 1964, Schacht states: "The [Western] scholarly

[30] Lewis, *The Crisis of Islam*, p. 8. In stark contradiction to Lewis, Bonderman states that sharīʿah "was virtually silent in the field of public law". See Bonderman "Modernization and Changing Perceptions of Islamic Law", p. 1175.
[31] See Yūsuf al-Qaraḍāwī, *Al-Fiqh al-Islāmī bayn al-Aṣālah wa al-Tajdīd*, 2nd ed. (Cairo: Maktabah Wahbah, 1999/1419), p. 5; Yūsuf al-Qaraḍāwī, *Fiqh al-Jihād: Dirāsah Muqāranah li-Aḥkāmih wa Falsafatih fī Ḍaw' al-Qur'ān wa al-Sunnah* (Cairo: Maktabah Wahbah, 2009), Vol. 2, p. 880; Ali Ahmad, "The Role of Islamic Law in the Contemporary World Order", *Journal of Islamic Law and Culture*, Vol. 6, 2001, p. 161. According to the words of Hashmi, "The [Islamic] legal tradition has historically dominated Islamic intellectual life", see Sohail H. Hashmi, "Islam, Sunni", *Encyclopedia of Religion and War*, ed., Gabriel Palmer-Fernandez (New York: Routledge, 2004), p. 218.
[32] Abdulaziz A. Sachedina, "The Development of *Jihad* in Islamic Revelation and History", in James Turner Johnson and John Kelsay, eds., *Cross, Crescent, and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (New York: Greenwood Press, 1990), p. 48; see also Khaled Abou El Fadl, "*Ahkam al-Bughat*: Irregular Warfare and the Law of Rebellion in Islam", in James Turner Johnson and John Kelsay, eds., *Cross, Crescent, and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (New York: Greenwood Press, 1990), p. 151.
[33] Sohail H. Hashmi, "Interpreting the Islamic Ethics of War and Peace", in Sohail H. Hashmi, ed., *Islamic Political Ethics: Civil Society, Pluralism, and Conflict* (Princeton: Princeton University Press, 2002), p. 195; Rudolph Peters, *Islam and Colonialism: The Doctrine of Jihad in Modern History* (The Hague: Mouton, 1979), p. 9; Muḥammad, *Al-Fiqh al-Islāmī*, p. 206; Fred McGraw Donner, "The Sources of Islamic Conceptions of War", in John Kelsay and James Turner Johnson, eds., *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions* (Westport, Conn.: Greenwood Press, 1991), p. 32; Louay M. Safi, *Peace and the Limits of War: Transcending the Classical Conception of Jihad*, 2nd ed. (London: International Institute of Islamic Thought, 2003), p. 5; Hadia Dajani-Shakeel, "A Reassessment of Some Medieval and Modern Perceptions of the Counter-Crusade", in Hadia Dajani-Shakeel and Ronald A. Messier, eds., *The*

investigation of Islamic law is still in its beginnings. This comes partly from the infinite variety and complexity of the subject."[34] Moreover, in 2000 Zahraa concluded that there was a lack of sufficient materials written in English which could "giv[e] non-Muslims an understanding of what Islamic law really is and to familiarise non-Muslims with it."[35] These statements indicate some of the other problems in the study of war in Islamic law in Western literature, in addition to the confusion between sharīʿah with *fiqh*. Understanding the nature and methodologies of Islamic law, as well as the paradigm of international relations in the period when classical Islamic law was formulated are prerequisites for studying the justifications for war in Islam.

### 3.3.1 Jihād

The word jihād, which is the term generally used for 'war' in Islamic legal texts, is derived from the verb *jāhad* (present, *yujāhid*) meaning to exert great effort or strive to achieve a laudable goal, either by doing something good or by abstaining from doing something bad. Jihād is thus a broad concept that refers to acts related to both oneself and others. Advising rulers to stop their tyranny is the highest degree of jihād. The Prophet Muḥammad said: "The best [type of] jihād is a word of truth to a tyrant ruler."[36] According to another ḥadīth, supporting one's parents is also an

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*Jihād and its Times: Dedicated to Andrew Stefan Ehrenkreutz*, Michigan Series on the Middle East, No. 4 (Ann Arbor: University of Michigan, Center for Near Eastern and North African Studies, 1991), p. 44.

[34] Schacht, *An Introduction to Islamic Law*, p. 5.

[35] Zahraa, "Characteristic Features of Islamic Law", p. 168.

[36] See, for example, Aḥmad ibn ʿAlī ibn Ḥajar al-ʿAsqalānī, *Fatḥ al-Bārī Sharḥ Ṣaḥīḥ al-Bukhārī*. ed. Muḥib al-Dīn al-Khaṭīb (Beirut: Dār al-Maʿrifah, n.d.), Vol. 13, p. 53; Ḥadīths numbers 5510, 5511 and 5512 in ʿAlā al-Dīn ʿAlī al-Muttaqī ibn Ḥusām al-Dīn, *Kanz al-'Ummāl fī Sunan al-Aqwāl wa al-Af'āl*, ed. Maḥmūd ʿUmar al-Dumyāṭī (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1998/1419), Vol. 3, p. 30; Ḥadīth number 18850 in Aḥmad ibn Ḥanbal, *Musnad al-Imām Aḥmad Ibn Ḥanbal* (Cairo: Mu'assasah Qurṭubah, n.d.), Vol. 4, p. 315; Badr al-Dīn Maḥmūd ibn Aḥmad al-ʿAynī, *'Umdah al-Qārī: Sharḥ Ṣaḥīḥ al-Bukhārī* (Beirut: Dār Iḥyā' al-Turāth al-ʿArabī, n.d.), Vol. , p. 224, Vol. 15, p. 166; Ḥadīth number 7834 in Aḥmad ibn Shuʿayb al-Nasā'ī, *Sunan al-Nasā'ī al-Kubrā*, ed. ʿAbd al-Ghaffār Sulaymān al-Bindarī and Sayyid Kasrawī Ḥasan (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1991/1411), Vol.

example of jihād.[37] Therefore, Justice Jamāl al-Dīn Maḥmūd, former deputy chief justice of the Court of Cassation of Egypt and member of the Islamic Research Council, proudly points out that Islam is the only religion that calls just war "jihād", i.e., striving to establish a just cause.[38] Jurists of the four schools of Islamic law expressed their definitions of jihād in the context of the Islamic law of war in different words. According to the Ḥanafī jurists, jihād means exerting one's utmost effort in fighting in the path of God either by taking part in battle or by supporting the army financially or by the tongue.[39] For the Mālikīs, jihād means exerting one's utmost effort in fighting against a non-Muslim enemy with whom Muslims have no peace agreement in order to raise the word of God, i.e., to convey or spread the

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4, p. 435; Ḥadīth number 4209 in Aḥmad ibn Shuʿayb al-Nasāʾī, *Al-Mujtabā min al-Sunan*, ed. ʿAbd al-Fattāḥ Abu Ghuddah, 2nd ed. (Aleppo: Maktab al-Maṭbūʿāt al-Islāmiyyah, 1986/1406), Vol. 7, p. 161; Muḥammad al-Ghazālī, *Iḥyāʾ ʿUlūm al-Dīn* (Beirut: Dār al-Maʿrifah, n.d.), Vol. 2, p. 343; Aḥmad ibn ʿAlī al-Rāzī al-Jaṣāṣ, *Aḥkām al-Qurʾān*, ed. Muḥammad al-Ṣādiq Qamḥāwī (Beirut: Dār Iḥyāʾ al-Turāth al-ʿArabī, 1984-5/1405), Vol. 1, p. 328, Vol. 2, p. 287, Vol. 4, p. 43; Muḥammad ibn Mufliḥ, *Al-Furūʿ*, ed. Abī al-Zahrāʾ Ḥāzim al-Qāḍī (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1997/1418), Vol. 1, p. 516.

[37] According to Yūsuf al-Qaraḍāwī, seeking to excel in one's education and work are also examples of jihād, see Muhammad Hashim Kamali, "Issues in the Understanding of *Jihād* and *Ijtihād*", *Islamic Studies*, Vol. 41, No, 4, 2002/1423, pp. 622 f. See also Abdulrahman Muhammad Alsumaih, "The Sunni Concept of Jihad in Classical Fiqh and Modern Islamic Thought" (PhD thesis, University of Newcastle Upon Tyne, 1998), pp. 6, 257, 369; Radwan A. Masmoudi, "Struggles Behind Words: Shariah Sunnism, and Jihad", *SAIS Review*, Vol. XXI, No. 2, Summer-Fall 2001, p. 23; Yahiya Emerick, "What is the Position of Islam on War and Conflict?", available from http://www.themodernreligion.com/jihad/def-emerick.html; Internet; accessed 21 July 2008.

[38] Jamāl al-Dīn Maḥmūd, "Al-Jihād wa Akhlāqiyyāt al-Ḥarb fī al-Islām", *Tolerance in the Islamic Civilization*, Researches and Facts, the Sixteenth General Conference of the Supreme Council for Islamic Affairs (Cairo: Supreme Council for Islamic Affairs, 2004/1425), p. 847.

[39] See, for example, ʿAlā al-Dīn al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ fī Tartīb al-Sharāʾiʿ*, 2nd ed. (Beirut: Dār al-Kitāb al-ʿArabī, 1982), Vol. 7, p. 97; Zayd al-Dīn ibn Najīm, *Al-Baḥr al-Rāʾiq Sharḥ Kanz al-Daqāʾiq*, 2nd ed. (Beirut: Dār al-Maʿrifah, n.d.), Vol. 5, p. 76; al-Shaykh Niẓām, and a group of Indian scholars, *Al-Fatāwā al-Hindiyyah: Fī Madhhab al-Imām al-Aʿẓam Abī Ḥanīfah al-Nuʿmān* (N.p.: Dār al-Fikr, 1991/1411), Vol. 2, p. 188; ʿAbd Allah Ghawshah, "Al-Jihād Ṭarīq al-Naṣr", *Kitāb al-Muʾtamar al-Rābiʿ li-Majmaʿ al-Buḥūth al-Islāmiyyah* (Cairo: Majmaʿ al-Buḥūth al-Islāmiyyah, 1968/1388), p. 184; Muḥammad ʿAbd al-Laṭīf al-Subkī, "Al-Jihād fī al-Islām", *Kitāb al-Muʾtamar al-Rābiʿ li-Majmaʿ al-Buḥūth al-Islāmiyyah* (Cairo: Majmaʿ al-Buḥūth al-Islāmiyyah, 1968/1388), pp. 277-280; Wahbah al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām: Dirāsah Muqāranah*, 3rd ed., (Damascus: Dār al-Fikr, 1998/1419), p. 33; Muḥammad Khyr Haykal, *Al-Jihād wa al-Qitāl fī al-Siyyāsah al-Sharʿiyyah*, 2nd ed. (Beirut: Dār al-Bayāriq, 1996/1417), Vol. 1, p. 44; Aḥmad Maḥmūd Krīmah, *Al-Jihād fī al-Islām: Dirāsah Fiqhiyyah Muqāranah* (Cairo: Al-Dār al-Handasiyyah, 2003/1424), p. 110; Alsumaih, "The Sunni Concept of Jihad", p. 14.

message of Islam.[40] The Shāfiʿīs define jihād as fighting in the path of God,[41] while the Ḥanbalīs simply define it as fighting against unbelievers.[42]

In fact, the terms used in the definitions above such as "fighting against unbelievers", "in the path of God" or "to raise the word of God", have all contributed to the misrepresentation of jihād by some as holy war against non-Muslims. But the jurists agree that there are two kinds of jihād: *jihād al-dafʿ* (defensive war) which is a *farḍ ʿayn* (personal duty of every capable person) and *jihād al-ṭalab* (offensive or pre-emptive war initiated by Muslims in non-Muslim territories) which is a *farḍ kifāyah* (collective duty on the Muslims, which may be fulfilled if sufficient numbers perform it). Jihād becomes a *farḍ ʿayn* when the enemy invades Muslim territory, while it is a *farḍ kifāyah* if it occurs outside Muslim territory.[43] The decision to initiate war must be taken by the legitimate authority.[44]

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[40] Muḥammad ibn Muḥammad ibn ʿAbd al-Raḥmān al-Ḥaṭṭāb, *Mawāhib al-Jalīl li-Sharḥ Mukhtaṣar Khalīl*, 2nd ed. (Beirut: Dār al-Fikr, 1977-8/1398), Vol. 3, p. 347; Aḥmad ibn Ghunaym ibn Sālim al-Nafarāwī, *Al-Fawākih al-Dawānī ʿalā Risālah Ibn Abī Zayd al-Qayrawānī* (Beirut: Dār al-Fikr, 1994-5/1415), Vol. 1, p. 395; al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, p. 33; Haykal, *Al-Jihād wa al-Qitāl*, Vol. 1, p. 44; Krīmah, *Al-Jihād fī al-Islām*, p. 110; Alsumaih, "The Sunni Concept of Jihad", p. 14.

[41] Al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, p. 33; Haykal, *Al-Jihād wa al-Qitāl*, Vol. 1, p. 44; Krīmah, *Al-Jihād fī al-Islām*, p. 110; Alsumaih, "The Sunni Concept of Jihad", p. 14.

[42] Manṣūr ibn Yūnus ibn Idrīs al-Buhūtī, *Kashshāf al-Qināʿ ʿan Matn al-Iqnāʿ*, ed. Hilāl Miṣīlḥī Muṣṭafā Hilāl (Beirut: Dār al-Fikr, 1981-2/1402), Vol. 3, p. 32; Muṣṭafā al-Suyūṭī al-Rahaybānī, *Maṭālib Ulī al-Nuhā fī Sharḥ Ghāyah al-Muntahā* (Damascus: Al-Maktab al-Islāmī, 1961), Vol. 2, p. 497; Abd al-Raḥman ibn ʿAbd Allah al-Baʿlī, *Kashf al-Mukhaddarāt wa al-Riyāḍ al-Muzhirāt li-Sharḥ Akhṣar al-Mukhtaṣarāt*, ed. Muḥammad ibn Nāṣir al-ʿAjamī (Beirut: Dār al-Bashā'ir al-Islāmiyyah, 2002/1423), Vol. 1, p. 343; Krīmah, *Al-Jihād fī al-Islām*, p. 110; Alsumaih, "The Sunni Concept of Jihad", p. 14.

[43] See, for example, Muḥyī al-Dīn ibn Sharaf al-Nawawī, *Minhāj al-Ṭālibīn wa ʿUmdah al-Muftīn*, ed. Muḥammad Muḥammad Ṭāhir Shaʿbān (Jeddah: Dār al-Minhāj, 2005/1426), p. 518; Yūsuf ibn ʿAbd al-Barr, *Al-Kāfī fī Fiqh Ahl al-Madīnah* (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1986-7/1407), p. 205; Zakariyyā ibn Muḥammad ibn Aḥmad ibn Zakariyyā al-Anṣārī, *Fatḥ al-Wahhāb bi-Sharḥ Manhaj al-Ṭullāb* (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1997-8/1418), Vol. 2, pp. 296-298; Zakariyyā ibn Muḥammad ibn Aḥmad ibn Zakariyyā al-Anṣārī, *Manhaj al-Ṭullāb* (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1997-8/1418), pp. 130 f.; Muḥammad al-Ghazālī, *Al-Waṣīt fī al-Madhhab*, ed. Aḥmad Maḥmūd Ibrāhīm and Muḥammad Muḥammad Tāmir (Cairo: Dār al-Salām, 1997/1417), Vol. 7, pp. 5-12; al-Rahaybānī, *Maṭālib*, Vol. 2, p. 07; Manṣūr ibn Yūnus ibn Idrīs al-Buhūtī, *Al-Rawḍ al-Murbiʿ: Sharḥ Zād al-Mustaqniʿ* (Riyadh: Maktabah al-Riyadh al-Ḥadīthah, 1970-1/1390), Vol. 2, p. 3; al-Buhūtī, *Kashshāf al-Qināʿ*, Vol. 3, pp. 33 f.; Mohamed Mokbel Mahmud Elbakry, "The Legality of 'War' in Al-Shariʿa Al-Islamiya (The Islamic Law) and Contemporary International Law: Comparative Study" (PhD thesis, University of Glasgow, 1987), pp. 241 f.; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, pp. 54 f., 64-114, 240, 411 f.

[44] See, for example, Muḥammad Saʿīd Ramaḍān al-Būṭī, *Al-Jihād fī al-Islām: Kayf Nafhamuh? Wa Kayf Numārisuh?*, 5th ed. (Damascus: Dār al-Fikr, 2006/1427), pp. 112, 114-117; Jamal Badawi,

### 3.3.2 Types of Jihād

Jihād in the sense of personal moral struggle is called *al-jihād al-akbar* (the greater jihād). It is divided into what is called "jihād against the self" and "jihād against the devil".[45] Jihād in the sense of an armed, state struggle is called *al-jihād al-aṣghar* (the lesser jihād) and falls into two main kinds: international and domestic jihād. International jihād, the most commonly referred to, is what the jurists sometimes called jihād against *al-kuffār* (unbelievers) or *jihād fī sabīl Allah* (jihād in the path of God), i.e., war with the non-Muslim states. In fact, by the very nature of the structure of the Islamic state, any armed jihād against *al-kuffār* is an international war. This is because, until the abolition of the caliphate on 3 March 1924, Muslims had been, at least theoretically united under one state. Thus, historically and/or theoretically, any jihād which occurred between the Islamic state and its enemies was a war between Muslims and their enemies, misleadingly labelled *kuffār*. But this does not mean that such war was necessarily motivated by the enemies' *kufr* (unbelief) because, historically and/or theoretically, *kuffār* were part of the Islamic state, which had legalized and practised the conclusion of peace treaties and non-aggression pacts with these *kuffār*, i.e., non-Muslim states and other forms of political or religious entities.

Domestic jihād, the subject of Chapter Five, is divided into four types: (1) fighting against *bughāh* (rebels, secessionists); (2) fighting against *muḥāribūn*/*quṭṭāʽ al-ṭarīq* (bandits, highway robbers, pirates); (3) fighting against *ahl al-riddah*

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"Muslim/Non-Muslim Relations: Reflections on some Qur'ānic Texts", *Scientific Review of the European Council for Fatwa and Research*, No. 6, January 2005/Dhū al-Ḥijjah 1425, p. 269; Katerina Dalacoura, "Violence, September 11 and the Interpretations of Islam", in Mashood A. Baderin, ed., *International Law and Islamic Law* (Aldershot: Ashgate, 2008), p. 236.

[45] See al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, pp. 52, 143-168.

(apostates) and (4) fighting against *khawārij* (roughly translated as violent religious fanatics).[46]

The concern of this chapter is with the Islamic justifications for international war, i.e., jihād against non-Muslim states. Two factors explain much of the controversy over the justifications for war in Islam between the insider and outsider. First, as several scholars have pointed out, classical Muslim jurists paid little attention to the Islamic *jus ad bellum* (justifications for resorting to war).[47] Second, there has been much misunderstanding of the role of the religion of Islam in the justifications for war, let alone the terms used in the definitions of jihād above. As indicated above, all the various practical aspects of life were discussed by Muslim jurists within Islamic jurisprudence. The five types of the armed jihād, whether within the Islamic state or against other states, are based on either religious, political or criminal grounds. Even when a war in these cases is waged on religious grounds, an investigation is still to be made to determine whether it is just or not. In other words, as Johnson points out, "Despite the invoking of religious authority of war, the causes of the wars in question were essentially temporal; despite being termed jihad, they were wars of the state, not wars of religion."[48]

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[46] See al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, pp. 59 f.; Khadduri, *War and Peace*, pp. 74- 82; Hilmi M. Zawati, *Is Jihad a Just War? War, Peace, and Human Rights under Islamic and Public International Law*, Studies in Religion and Society, Vol. 53 (Lewiston, NY: Edwin Mellen Press, 2001), pp. 29-39; Muḥammad Ibrāhīm ʿAbd Allah al-Twijrī, *Mukhtaṣar al-Fiqh al-Islāmī* (Riyadh: Dār al-Maʿrāj al-Dawliyyah, 2000/1421), pp. 837 f.; Lambton, *State and Government in Medieval Islam*, p. 211. See Chapter Five.

[47] Rudolph Peters, *Jihad in Classical and Modern Islam* (Princeton: Markus Wiener, 1996), p. 119; Khaled Abou El Fadl, "The Rules of Killing at War: An Inquiry into Classical Sources", *The Muslim World*, Vol. LXXXIX, No. 2, April, 1999, p. 150; Khaled Abou El Fadl, "Islam and the Theology of Power", *Middle East Report*, No. 221, Winter 2001, p. 30; Ann Elizabeth Mayer, "War and Peace in the Islamic Tradition and International Law", in John Kelsay and James Turner Johnson, eds., *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions* (Westport, Conn.: Greenwood Press, 1991), p. 197; Sohail H. Hashmi, "Saving and Taking Life in War: Three Modern Muslim Views", *The Muslim World*, Vol. LXXXIX, No. 2, April, 1999, p. 158.

[48] James Turner Johnson, *The Holy War Idea in Western and Islamic Traditions* (Pennsylvania: Pennsylvania State University Press, 1997), p. 96.

Concerning the first factor, the classical Muslim jurists' discussions, although scant, can still give a fair understanding of the Islamic justifications for war, again especially in the light of the contexts of their time. Thus, comparing contemporary Muslims' discussions of the same issue with their classical counterparts' is important in order to give the Islamic perspective on the justifications for war in the modern world. In addition, comparing these classical and modern insider discussions with the outsider literature is also necessary in order to find out the reasons of the controversies and misunderstandings about jihād. Furthermore, examining the basis of the classical Muslim jurists' three conceptual divisions of the world into the *dār al-Islām* (lit. house of Islam), *dār al-ḥarb* (house of war) and *dār al-ṣulḥ* (house of peace) also gives some insights into the Islamic justifications for war and the Islamic attitudes towards relations with non-Muslim states. This chapter will therefore attempt to study these two points, i.e., the insider/outsider justifications for war and the classical Muslim jurists' division of the world.

### 3.4.1 Classical and Contemporary Insider Justifications for War

At the outset, it should be mentioned here that Ibn Taymiyyah (d. 728/1328) was the first scholar to pay adequate attention to the question of *sabab qitāl al-kuffār* (justifications for war against unbelievers).[49] Although this question is the central point for understanding the nature of the Islamic law of war, classical and even many contemporary Muslim scholars fail to expound on it in their various approaches to the study of war in Islam. Ibn Taymiyyah's analysis of the classical Muslim jurists' positions on this question, which is reiterated by many modern Muslim scholars,

[49] See Aḥmad ibn ʿAbd al-Ḥalīm ibn Taymiyyah, *Qāʿidah Mukhtaṣarah fī Qitāl al-Kuffār wa Muhādanatihim wa Taḥrīm Qatlihim li-Mujarrad Kufrihim: Qāʿidah Tubayyn al-Qiyam al-Sāmiyah lil-Ḥaḍārah al-Islāmiyyah fī al-Ḥarb wa al-Qitāl,* ed. ʿAbd al-ʿAzīz ibn ʿAbd Allah ibn Ibrāhīm al-Zayd Āl Ḥamad (Riyadh: N.p., 2004/1424).

reflects the diverse interpretations of the Qur'ānic *casus belli*, which were considered in Chapter Two. The disagreement over whether it is *kufr* (unbelief), or acts of aggression against Muslims, that is the Qur'ānic *casus belli* results in two different juridical positions being taken on the justifications for war against non-Muslims.

The first position, according to the majority of jurists,[50] the Ḥanafī, Mālikī, and Ḥanbalī schools, is that the Qur'ānic *casus belli* are restricted to aggression against Muslims and *fitnah*, i.e., persecution of Muslims because of their religious belief (Qur'ān 2:190; 2:193; 4:75; 22:39-40). War and coercion are not means by which religion may be propagated because belief in a religion is only a matter of the conviction of the heart (Qur'ān 2:256; 10:99; 16:93; 18:29). Fighting non-Muslims solely because they do not believe in Islam contradicts the Qur'ānic injunction (Qur'ān 2:256). These jurists therefore maintain that only combatants are to be fought; non-combatants such as women, children, clergy, the aged, the insane, farmers, serfs and the blind, etc., are not to be killed in war,[51] as discussed in the next

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[50] Ibn Taymiyyah, *Qāʿidah Mukhtaṣarah fī Qitāl al-Kuffār*, p. 87; Muḥammad ibn Ismāʿīl al-Ṣanaʿānī, "Baḥth fī Qitāl al-Kufār", in Yūsuf al-Qaraḍāwī, *Fiqh al-Jihād: Dirāsah Muqāranah li-Aḥkāmih wa Falsafatih fī Ḍaw' al-Qur'ān wa al-Sunnah* (Cairo: Maktabah Wahbah, 2009), Vol. 2, p. 1202; Muḥammad Abū Zahrah, *Al-ʿAlāqāt al-Dawliyyah fī al-Islām* (Cairo: Al-Dār al-Qawmiyyah lil-Ṭibāʿah wa al-Nashr, 1964/1384), p. 52; al-Būṭī, *Al-Jihād fī al-Islām*, p. 94; Muḥammad al-Ṣādiq ʿAfīfī, *Al-Mujtamaʿ al-Islāmī wa al-ʿAlāqāt al-Dawliyyah* (Cairo: Mu'assasah al-Khānjī, 1980), p. 146; ʿAbd al-Laṭīf ʿĀmir, *Aḥkām al-Asrā wa al-Sabāyā fī al-Ḥurūb al-Islāmiyyah* (Cairo: Dār al-Kitāb al-Miṣrī; Beirut: Dār al-Kitāb al-Lubnānī, 1986/1406), p. 63; ʿUmar Aḥmad al-Firjānī, *Uṣūl al-ʿAlāqāt al-Dawliyyah fī al-Islām*, 2nd ed. (Tripoli, Libya: Dār Iqra', 1988/1397), p. 85; Nādiyah Ḥusnī Ṣaqr, *Falsafah al-Ḥarb fī al-Islām* (Cairo: Supreme Council for Islamic Affairs, 1990/1410), pp. 95 f.; Abou El Fadl, "Islam and the Theology of Power", p. 29; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, pp. 376 f., Vol. 2, p. 1038.

[51] Ibn Taymiyyah, *Qāʿidah Mukhtaṣarah fī Qitāl al-Kuffār*, pp. 90-219; al-Ṣanaʿānī, "Baḥth fī Qitāl al-Kufār", pp. 1202-1211, 1215; Wahbah al-Zuḥaylī, *Al-ʿAlāqāt al-Dawliyyah fī al-Islam: Muqāranah bi-al-Qānūn al-Dawlī al-Ḥadīth* (Beirut: Mu'assasah al-Risālah, 1981/1401), pp. 101 f.; Wahbah al-Zuḥaylī, "Majālāt al-ʿAlāqāt al-Dawliyyah fī al-Islām", in Fārūq Ḥamādah, ed., *Al-Tashrīʿ al-Dawlī fī al-Islām*, Nadawāt wa Munāẓarāt, No. 70 (Rabat: Kulliyyah al-Ādāb wa al-ʿUlūm al-Insāniyyah, 1997), p. 198; al-Būṭī, *Al-Jihād fī Al-Islām*, pp. 94-102; Muḥammad ibn al-Ḥasan al-Shaybānī, *Al-Siyar al-Kabīr*, ed. Ṣalāḥ al-Dīn al-Munjid (Cairo: Maʿhad al-Makhṭūṭāt, n.d.), Vol. 4, pp. 1415-1417, 1429-1447; Muḥammad ibn al-Ḥasan al-Shaybānī, *Al-Siyar*, ed. Majid Khadduri (Beirut: Al-Dār al-Muttaḥidah, 1975), p. 249; Aḥmad ibn Idrīs al-Qarāfī, *Al-Dhakhīrah*, ed. Muḥammad Būkhubzah (Beirut: Dār al-Gharb al-Islāmī, 1994), Vol. 3, pp. 387-393, 397-401; Ibn ʿAbd al-Barr, *Al-Kāfī fī Fiqh Ahl al-Madīnah*, p. 208; Muwaffaq al-Dīn ʿAbd Allah ibn Qudāmah, *Al-Kāfī fī Fiqh al-Imām Aḥmad Ibn Ḥanbal*, ed. Muḥammad Fāris and Musʿad ʿAbd al-Ḥamīd al-Saʿdanī (Beirut: Dār al-Kutub al-ʿIlmiyyah, 2004), Vol. 4, pp. 125 f.; Aḥmad ibn ʿAbd al-Ḥalīm ibn Taymiyyah, *Al-Siyāsah al-Sharʿiyyah fī Iṣlāḥ al-Rāʿī wa al-Raʿiyyah* (N.p.: Dār al-Maʿrifah, n.d.), p. 104; ʿAbd Allah ibn

chapter. This prohibition means that fighting is permitted only against those whom Ibn Taymiyyah calls *ahl al-mumānaʻah wa al-muqātilah* (combatants) and not against unbelievers per se.[52] Furthermore, Ibn Taymiyyah and al-Ṣanaʿānī (d. 1768) point out, after the cessation of hostilities, non-Muslim prisoners of war are to be released freely or in exchange and are not to be forced to adopt Islam.[53] This indicates that their unbelief in itself is not the justification for war, otherwise they would not be released without accepting Islam. Thus, the Ḥanafī jurist Ibn Najīm explicitly states: "the reason for jihād in our [the Ḥanafīs] view is *kawnuhum ḥarbā ʻalaynā* [literally, their being at war against us], while in al-Shāfiʿī's view it is their

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Maḥmūd ibn Mawdūd, *Al-Ikhtiyār li-Taʻlīl al-Mukhtār*, ed. ʿAbd al-Laṭīf Muḥammad ʿAbd al-Raḥman, 3rd ed. (Beirut: Dār al-Kutub al-ʿIlmiyyah, 2005/1426), Vol. 4, pp. 127 f.; Muḥammad ibn ʿAlī ibn Muḥammad al-Shawkānī, *Nayl al-Awṭār: Min Aḥādīth Sayyid al-Khyār Sharḥ Muntaqā al-Akhbār* (Beirut: Dār al-Jīl, 1973), Vol. 8, pp. 71-74; ʿĀrif Khalīl Abū ʿĪd, *Al-ʻAlāqāt al-Khārijyyah fī Dawlah al-Khilāfah*, 2nd ed. (Birmingham: Dar Arqam, 1990), pp. 182-185; Ibrāhīm Yaḥyā al-Shihābī, *Mafhūm al-Ḥarb wa al-Salām fī al-Islām: Ṣirāʻāt wa Ḥurūb amm Tafāʻul wa Salām?* (N.p.: Manshūrāt Mu'assasah Maī, 1990/1399), p. 76; Muḥammad Sayyid Ṭanṭāwī, "Al-Ḥukm al-Sharʿī fī Aḥdāth al-Khalīj", *The Islamic Fiqh Council Journal*, Issue No. 5, [1991/1411], pp. 58-60; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, p. 376; Sobhi Mahmassani, "The Principles of International Law in the Light of Islamic Doctrine", *Recueil des Cours*, Vol. 117, 1966, pp. 301-304; Muḥammad Ḥammīdullāh, *Muslim Conduct of State: Being a Treatise on Siyar, That is Islamic Notion of Public International Law, Consisting of the Laws of Peace, War and Neutrality, Together with Precedents from Orthodox Practice and Preceded by a Historical and General Introduction* , rev. & enl. 5th ed. (Lahore: Sh. Muhammad Ashraf, 1968), p. 204; Khalid Yahya Blankinship, *The End of the Jihād State: The Reign of Hishām Ibn ʻAbd al-Malik and the Collapse of the Umayyads* (New York: State University of New York Press, 1994), p. 15; James Turner Johnson, *Morality and Contemporary Warfare* (New Haven: Yale University Press, 1999), pp. 183-185; Hashmi, "Islam, Sunni", p. 219; Esposito, *Unholy War*, p. 32; Mustansir Mir, "Islam, Qur'anic", *Encyclopedia of Religion and War*, ed., Gabriel Palmer-Fernandez (New York: Routledge, 2004), p. 209; John Kelsay, "Islamic Law of War", *Encyclopedia of Religion and War*, ed., Gabriel Palmer-Fernandez (New York: Routledge, 2004), p. 224; John Kelsay, *Arguing the Just War in Islam* (Cambridge, MA: Harvard University Press, 2007), p. 106; Khadduri, *War and Peace*, pp. 103 f.; ʿAlī Muḥyī al-Dīn al-Qarah Dāghī, "Al-Usus wa al-Mabādi' al-Islāmiyyah lil-ʿAlāqat al-Dawliyyah", *Scientific Review of the European Council for Fatwa and Research*, May 2007, Issues 10-11, Part 1, p. 182; Reza Simbar, "The Changing Role of Islam in International Relations", *Journal of International and Area Studies*, Vol. 15, No. 2, 2008, pp. 58-60; Ṣalāh al-Ṣāwī, "Al-Judhūr al-Fikriyyah lil-ʿAmaliyyāt al-Irhābiyyah", available from http://www.amjaonline.com/ar_d_details.php?id=16#; Internet; accessed 8 April 2009, pp. 4-6.

[52] Aḥmad ibn ʿAbd al-Ḥalīm ibn Taymiyyah, *Fiqh al-Jihād li-Shaykh al-Islām al-Imām Ibn Taymiyyah*, ed. Zuhayr Shafīq al-Kabbī (Beirut: Dār al-Fikr al-ʿArabī, 1992/1412), pp. 74, 197 f.; Ibn Taymiyyah, *Al-Siyāsah al-Sharʻiyyah*, p. 104. See also Muḥammad ibn Abī Bakr ibn Qayyim al-Jawziyyah, *Aḥkām ahl al-Dhimmah*, ed. Abī Barā' Yūsuf ibn Aḥmad al-Bakrī and Abī Aḥmad Shākir ibn Tawfīq al-ʿĀrūrī (Al-Dammam: Ramādī lil-Nashr, 1997/1418), Vol. 1, p. 110; Ibn Mawdūd, *Al-Ikhtiyār*, Vol. 4, p. 128.

[53] Ibn Taymiyyah, *Qāʻidah Mukhtaṣarah fī Qitāl al-Kuffār*, pp. 129 f.; al-Ṣanaʿānī, "Baḥth fī Qitāl al-Kufār", pp. 1206 f. It is interesting to add here that Troy S. Thomas's study of the prisoners of war in Islamic law "challenges the perception that Islam is spread only by force as evidenced by the options available to the enemies of Islam prior to war and the rights prisoner's have during the course of their captivity." Thomas, "Jihad's Captives", pp. 98 f.

unbelief."[54] In fact, what Ibn Najīm means here is that the justification for jihād is the enemy's hostility and aggression.[55] But the classical Muslim jurists add a peculiar dimension to what constitutes this hostility and aggression, which is a core justification for war in Islam, as explained below. The Ḥanafī jurists al-Shaybānī (d. 189/804-5) and al-Sarakhsī (d. 483/1090-1) emphasise that "although *kufr* [unbelief in God] is one of the greatest sins, it is between the individual and his God the Almighty and the punishment for this sin is to be postponed to the *dār al-jazā'*, (the abode of reckoning, the Hereafter)".[56]

The ḥadīth narrated by Abū Hurayrah in which the Prophet says, "I have been ordered to fight against *the people* [emphasis added] until they say: There is no God but God",[57] refers only to the Arab idolaters, according to "the majority of the Muslims",[58] including the Ḥanafīs and Ibn Ḥanbal, while for the Mālikīs, it refers only to the tribe of Quraysh.[59] That is because non-Arab/non-Qurayshite idolaters

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[54] Ibn Najīm, *Al-Baḥr al-Rā'iq*, Vol. 5, p. 76.
[55] See al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, pp. 373 f.
[56] Al-Shaybānī, *Al-Siyar al-Kabīr*, Vol. 4, p. 1415; Muḥammad ibn Aḥmad ibn Abī Sahl al-Sarakhsī, *Kitāb al-Mabsūt* (Beirut: Dār al-Maʿrifah, n.d.), Vol. 10, p. 110. Attributed to al-Sarakhsī, these words are also quoted by Gerhard Conrad and Khaled Abou El Fadl. See Gerhard Conrad, "Combatant and Prisoner of War in Classical Islamic Law: Concepts formulated by Hanafi Jurists of the 12th Century", *Revue de Droit Pénal Militaire et de Droit de la Guerre*, Vol. 20, p. 276; Abou El Fadl, "The Rules of Killing at War", p. 152.
[57] Ḥadīths numbers 1335, 2786, 6526 and 6855 in Muḥammad ibn Ismāʿīl al-Bukhārī, *Al-Jāmi' al-Ṣaḥīḥ al-Mukhtaṣar*, ed. Muṣṭafā Dīb al-Baghā, 3rd ed. (Damascus; Beirut: Dār ibn Kathīr, 1987/1407), Vol. 1, p. 507, Vol. 3, p. 1077, Vol. 6, pp. 2538, 2657. See also Muḥammad ibn Ismāʿīl al-Bukhārī, *The Translation of the Meanings of Ṣaḥiḥ al-Bukhārī: Arabic-English*, trans. Muḥammad Muḥsin Khan (New Delhi: Kitab Bhavan, 1984; reprint, 1987), Vol. IV, p. 124.
[58] Aḥmad Shalabī, *Al-Jihād wa al-Nuẓum al-'Askariyyah fī al-Tafkīr al-Islāmī*, Mawsūʿah al-Nuẓum wa al-Ḥaḍārah al-Islāmiyyah 6, 2nd ed. (Cairo: Maktabat al-Nahḍah al-Miṣriyyah, 1974), pp. 61 f.; al-Zuḥaylī, *Al-'Alāqāt al-Dawliyyah*, p. 97. See also Rudolph Peters, "Djihad: War of Aggression or Defense?", in Albert Dietrich, ed., *Akten des VII. Kongresses Für Arabistik und Islamwissenschaft* (Göttingen, Aug. 1974) (Göttingen: Vandenhoeck & Ruprecht, 1976), p. 287; Mir, "Islam, Qur'anic", p. 209.
[59] Al-Shaybānī, *Al-Siyar*, p. 222; Muwaffaq al-Dīn ʿAbd Allah ibn Aḥmad ibn Qudāmah, *Al-Mughnī: fī Fiqh al-Imām Aḥmad Ibn Ḥanbal al-Shaybānī* (Beirut: Dār al-Fikr, 1984-5/1405), Vol. 9, p. 173; ʿAlī ibn Muḥammad ibn Ḥabīb al-Māwardī, *Al-Ḥāwī al-Kabīr: Fī Fiqh Madhhab al-Imām al-Shāfi'ī Raḍī Allah 'anh wa huwa Sharḥ Mukhtaṣar al-Muznī*, ed. ʿAlī Muḥammad Muʿawwaḍ and ʿĀdil Aḥmad ʿAbd al-Mawjūd (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1999) Vol. 14, p. 153; Muḥyī al-Dīn ibn Sharaf al-Nawawī, *Al-Majmū': Sharḥ al-Muhadhdhab*, ed. Maḥmūd Maṭrajī (Beirut: Dār al-Fikr, 2000), Vol. 21, pp. 45-47; Peters, *Islam and Colonialism*, p. 36; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, p. 328.

may either accept Islam or pay *jizyah*[60] (the tax levied to exempt eligible males from conscription).[61] More importantly, this ḥadīth means, as Ibn Taymiyyah explains it, that if non-Muslim enemy combatants during the conduct of war accept Islam, the war must cease, but this does not mean that all people have to be fought until they accept Islam.[62] Concerning the reason why *jizyah* was not to be accepted from Arab/Qurayshite idolaters, according to those who maintain that *jizyah* was not accepted from them, it is argued that this was because they had already accepted Islam before *jizyah* was introduced.[63]

It is therefore clear, according to this interpretation of the Qur'ān and ḥadīth, that peace should characterise the normal and permanent relationship with non-Muslims.[64] This conclusion is drawn from the view of these jurists that recourse to

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[60] See, for example, al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, pp. 106-108; Wahbah al-Zuḥaylī, "Islam and International Law", *International Review of the Red Cross*, Vol. 87, No. 858, June 2005, pp. 270-276; ʿAbd al-Wahhāb Khallāf, *Al-Siyāsah al-Shar'iyyah: Aw Niẓām al-Dawlah al-Islāmiyyah fī al-Shu'ūn al-Dustūriyyah wa al-Khārijiyyah wa al-Māliyyah*, 6th ed. (Beirut: Mu'sassah al-Risalah, 1997/1418), pp. 72-76; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1. pp. 329 f.

[61] *Jizyah*, according to T.W. Arnold, "released [non-Muslims] from the compulsory military service that was incumbent on their Muslim fellow-subjects." See T.W. Arnold, *The Preaching of Islam: A History of the Propagation of the Muslim Faith*, 2nd ed. rev. & enl. (London: Constable & Company, 1913), p. 59; see also Niaz A. Shah, *Self-Defense in Islamic and International Law: Assessing Al-Qaeda and the Invasion of Iraq* (New York: Palgrave Macmillan, 2008), pp. 19 f.; Mir, "Islam, Qur'anic", p. 210; George W. Gawrych, "Jihad, War, and Terrorism", available form http://smallwarsjournal.com/documents/gawrych.pdf; Internet; accessed 21 March 2009, p. 5. On the rules of Jizyah in Islamic law see, for example, Ibn Qayyim al-Jawziyyah, *Aḥkām ahl al-Dhimmah*, Vol. 1, pp. 79-111, 119-245; Abū Yūsuf Yaʿqūb ibn Ibrāhīm al-Anṣārī, *Kitab- Ul-Kharaj (Islamic Revenue Code)*, trans. Abid Ahmad Ali, 2nd ed. (Lahore: Islamic Book Centre, 1993), pp. 245-254.

[62] Ibn Taymiyyah, *Qā'idah Mukhtaṣarah fī Qitāl al-Kuffār*, pp. 95 f.; al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, p. 107; ʿAbd al-ʿAzīz Zahrān, *Al-Silm wa al-Ḥarb fī al-Islām*, Kutub Islāmiyyah, Issue 164 (Cairo: Supreme Council for Islamic Affairs, 1974/1394), p. 42; Muḥammad ʿIzzat Darwazah, *Al-Jihād fī Sabīl Allah fī al-Qur'ān wa al-Ḥadīth*, 2nd ed. (Beirut: Al-Nāshir, 1990), p. 72; ʿAbd Allah ibn Zayd Āl Maḥmūd, *Al-Jihād al-Mashrū' fī al-Islām: Wa Talīhā Risalah "Qā'idah fī Qitāl al-Kuffār" li-Shaykh al-Islām Ibn Taymiyyah* (Doha: Maṭābiʿ ʿAlī bin ʿAlī, n.d.), p. 32; Ẓāfir al-Qāsimī, *Al-Jihād wa al-Ḥuqūq al-Dawliyyah al-'Āmmah fī al-Islām* (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1982), p. 167; al-Ghunaimi, *Qānūn al-Salām fī al-Islām*, p. 57; ʿAfīfī, *Al-Mujtama' al-Islāmī*, p. 151; al-Quṭb Muḥammad al-Quṭb Ṭabliyyah, *Al-Islām wa Ḥuqūq al-Insān: Al-Jihād* ([Cairo]: Dār al-Fikr al-ʿArabī; al-Nahḍah al-Miṣriyyah; al-Mujallad al-ʿArabī, al-Ṣaḥwah, 1989/1409), p. 74; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, pp. 335-337.

[63] See Ibn Taymiyyah, *Qā'idah Mukhtaṣarah fī Qitāl al-Kuffār*, p. 183; Muḥammad ibn Ismāʿīl al-Ṣanaʿānī, *Subul al-Salām: Sharḥ Bulūgh al-Marām min Adillah al-Aḥkām*, ed. Muḥammad ʿAbd al-ʿAzīz al-Khūlī, 4th ed. (Beirut: Iḥyā' al-Turāth al-ʿArabī, 1959-60/1379), Vol. 4, p. 47; al-Sayyid Sābiq, *Fiqh al-Sunnah* (Cairo: Al-Fatḥ lil-Iʿlām al-ʿArabī, n.d.), Vol. 3, 49; al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, p. 102; Peters, *Islam and Colonialism*, p. 36.

[64] See, for example, Iḥsān al-Hindī, *Aḥkām al-Ḥarb wa al-Salām fī Dawlah al-Islām* (Damascus: Dār al-Numayr, 1993/1413), pp. 119-122; Aḥmad ʿAbd al-Wanys Shitā, "Al-ʿAlāqāt al-Dawliyyah fī al-

war is only justified in defence against enemy hostility and aggression. In line with this position, Ibn Taymiyyah emphasised that jihād is "a defensive war against unbelievers whenever they threatened Islam."[65] This means that Khadduri's description of Ibn Taymiyyah's emphasis on the defensive nature of jihād as a "concession to reality"[66] is unwarranted. Khadduri argues that Ibn Taymiyyah's changing the meaning of jihād to a war which is only defensive occurred after the decline of Muslim power when "it was no longer compatible with Muslim interests".[67] He adds that by the fourth/tenth century, the meaning of jihād had undergone a change from permanent war to "dormant war" because of the decline of Muslim power and the "process of evolution dictated by Islam's interests and social conditions."[68] Many Western researchers have taken this claim at face value.[69] However, Ibn Taymiyyah here is not changing the meaning of jihād but is advocating his interpretation of the meaning of jihād as given by the majority of eighth-century jurists. He espouses this position on the basis of his conviction that all the Prophet's engagements with the Muslims' enemies were defensive. In addition to this, the Qur'ānic emphasis on the prohibition of "compulsion in religion" reinforces the majority's position that non-acceptance of Islam is not a justification for war. The idea that the Muslim jurists changed the meaning of jihād after the Islamic state

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Islām: Al-Asās al-Sharʿī wa al-Mabādi' al-Ḥākimah lil-ʿAlāqāt al-Khārijiyyah lil-Dawlah al-Islamiyyah", in Nādiyah Maḥmūd Muṣṭafā, Wadūdah ʿAbd al-Raḥman Badrān, Aḥmad ʿAbd al-Wanys Shitā, eds., *Al-ʿAlāqāt al-Dawliyyah fī al-Islām: Al-Muqaddimah al-ʿĀmmah lil-Mashrūʿ*, Mashrūʿ al-ʿAlāqāt al-Dawliyyah fī al-Islām 1 (Cairo: Al-Maʿhad al-ʿĀlamī lil-Fikr al-Islāmī, 1996), pp. 145-152; Krīmah, *Al-Jihād fī al-Islām*, pp. 35-41.

[65] Khadduri, *The Islamic Law of Nations*, p. 59; see also al-Zuḥaylī, "Islam and International Law", p. 281. On Ibn Taymiyyah's understanding of jihād see, Mohammad Farid ibn Mohammad Sharif, "Jihād in Ibn Taymīyyah's Thought", *The Islamic Quarterly*, Vol. 49, Issue 3, pp. 183-203.

[66] Khadduri, *The Islamic Law of Nations*, p. 59; Majid Khadduri, *The Law of War and Peace in Islam: A Study in Muslim International Law* (London: Luzac & Co., 1940), p. 37; Khadduri, *The Islamic conception of Justice*, p. 169.

[67] Khadduri, *War and Peace*, p. 65. See also A. Abel, "Dār al-Ḥarb", *Encyclopaedia of Islam*, New ed., Vol. II, p. 126.

[68] Khadduri, *War and Peace*, p. 66.

[69] See, for example, David Aaron Schwartz, "International Terrorism and Islamic Law", *Columbia Journal of Transnational Law*, Vol. 29, 1991, pp. 645 f.

became weak, because war was no longer in their interests, undermines the thesis upon which Western studies on jihād are based, namely, that jihād, and even the classical paradigm of international relations developed by the jurists of the second/eighth century, were based on the permanent laws of the sharīʿah, for it indicates that the jurists interpreted or formulated the law of war on the basis of their interests and not on the dictates of the sharīʿah.

Nonetheless, Khadduri himself notes that, long before Ibn Taymiyyah, the second/eighth century jurist Sufyān al-Thawrī (d. 161/778) headed what Khadduri calls a pacifist school, which maintained that jihād was only a defensive war, basing its argument on the Qur'ānic verse: "And fight in the way of God those who fight against you but *lā taʿtadūā* (do not transgress)" (Qur'ān 2:190).[70] Furthermore, he also states that the jurists who held this position, among whom he refers to Ḥanafī jurists, al-Awzāʿī (d. 157/774), Mālik ibn Anas (d. 179/795)[71] and other early jurists, "stressed that tolerance should be shown unbelievers, especially scripturaries and advised the Imām to prosecute war only when the inhabitants of the dār al-ḥarb came into conflict with Islam."[72] This means that, long before Ibn Taymiyyah stressed the defensive nature of jihād, a line of thought among the earliest Muslim jurists had already advocated this position and thus Ibn Taymiyyah did not originate this so-called change in the meaning of jihād.

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[70] Khadduri, *The Law of War and Peace*, pp. 36 f.

[71] On the life, education, students and works of Mālik ibn Anas see, Muṣṭafā al-Sibāʿī, *Al-Sunnah wa Makānatihā fī al-Tashrīʿ al-Islāmī*, 4th ed. (Beirut: Al-Maktab al-Islāmī, 1985/1405), pp. 430-438; Doi, *Sharīʿah: The Islamic Law*, pp. 93-103; C.G. Weeramantry, *Islamic Jurisprudence: An International Perspective* (Basingstoke: Macmillan, 1988), pp. 51 f.

[72] Khadduri, *The Islamic Law of Nations*, p. 58. This phrase is also stated almost literally in his *The Islamic conception of Justice* (Baltimore, MD.: Johns Hopkins University Press, 1984), p. 165. See also T.R. Copinger-Symes, "Is Osama bin Laden's '*Fatwa* Urging *Jihad* against Americans' dated 23 February 1998 Justified y Islamic Law?", in Mashood A. Baderin, ed., *International Law and Islamic Law* (Aldershot: Ashgate, 2008), p. 51.

However, as Khadduri rightly points out, Abū Ḥanīfah (d. 150/767-8)[73] and his students, including al-Shaybānī, formulated their rules of international law on the assumption that a state of war existed between the Islamic and non-Muslim states. It is important to add here that this assumption was not based on an interpretation of the Islamic sources but on the reality of their current situation. In fact, a state of war, in the absence of a peace treaty, characterizes the pattern of international relations during the periods in which Islam emerged. In the words of John L. Esposito, the classical Muslim jurists formulated the Islamic law of war in a world "where war was the natural state."[74] Abdullahi Ahmed An-Naʿim also notes: "the first three centuries of Islam was an extremely harsh and violent environment, where the use of force in intercommunal relations was the unquestioned norm."[75] In the words of Sherman A. Jackson, "a prevailing 'state of war,' rather than difference of religion, was the *raison d'être* of jihad".[76] Furthermore, Khalid Yahya Blankinship adds that a pattern of a permanent state of war had existed throughout history. For example, he writes, "The Assyrians, like the Romans under the Republic, used to take to the field every year against someone. Frequently, if a treaty did not exist, a state of war was assumed. Even the United States and its allies in modern times have preferred a policy of obtaining the unconditional surrender of the enemy where possible, as in the Second World War."[77]

The second position, founded by al-Shāfiʿī (d. 204/820)[78] and maintained by some Ḥanbalī jurists and Ibn Ḥazm (d. 456/1064) of the extinct Ẓāhirī school, is that

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[73] On Abū Ḥanīfah's life, education and students see, al-Sibāʿī, *Al-Sunnah wa Makānatihā*, pp. 401-429; Doi, *Sharīʿah: The Islamic Law*, pp. 88-93; Weeramantry, *Islamic Jurisprudence*, pp. 49-51.
[74] Esposito, *Unholy War*, p. 29.
[75] Abdullahi Ahmed An-Naʿim, "Upholding International Legality against Islamic and American Jihad", in Ken Booth and Tim Dunne, eds., *Worlds in Collision: Terror and the Future of Global Order* (Basingstoke: Palgrave Macmillan, 2002), p. 166.
[76] Jackson, "Jihad and the Modern World", p. 25.
[77] Blankinship, *The End of the Jihād State*, p. 18.
[78] On the life, education and works of al-Shāfiʿī see, al-Sibāʿī, *Al-Sunnah wa Makānatihā*, pp. 439-441; Doi, *Sharīʿah: The Islamic Law*, pp. 103-107; Weeramantry, *Islamic Jurisprudence*, pp. 52-54.

Muslims are to wage war against unbelievers if they refuse to accept Islam or submit to Muslim rule. Al-Shāfiʿī here bases his opinion on the theory that the Qur'ānic texts 9:5 and 9:29 abrogated all the other texts and the above ḥadīth narrated by Abū Hurayrah. However, he differentiates between Arab and non-Arab idolaters: Arab idolaters are to be fought if they do not accept Islam, while non-Arab idolaters and the people of the book are to accept Islam or pay *jizyah*; otherwise Muslims are to fight them.[79] Since al-Shāfiʿī maintains that it was unbelief, not aggression, that was the *casus belli* in these texts, he permits fighting some categories of non-combatants "such as the peasants, the crippled and the aged until they become Muslims or pay *jizyah*", although he does not include women and children.[80] However, he adds that Muslims are to cease fighting in cases of necessity, for example, when they are weak. According to this position, therefore, jihād is not only a defensive war but also an offensive war against non-Muslims, and Khadduri points out here that it "was Shāfiʿī who first formulated the doctrine that the jihād had for its intent the waging of war on unbelievers for their disbelief and not merely when they entered into conflict with Islam."[81] According to this minority position, a permanent state of war exists until non-Muslims accept Islam or submit to Muslim rule. Although based on the

[79] Muḥammad ibn Idrīs al-Shāfiʿī, *Al-Umm*, 2nd ed. (Beirut: Dār al-Maʿrifah, [1973]/1393), Vol. 4, pp. 238-241; Ibn Taymiyyah, *Qāʿidah Mukhtaṣarah fī Qitāl al-Kuffār*, pp. 88 f.; al-Ṣanaʿānī, "Baḥth fī Qitāl al-Kufār", pp. 1211-1215; Khallāf, *Al-Siyāsah al-Sharʿiyyah*, pp. 65-72; Shitā, "Al-ʿAlāqāt al-Dawliyyah fī al-Islām", pp. 136-144; al-Hindī, *Aḥkām al-Ḥarb wa al-Salām*, pp. 122-125; al-Būṭī, *Al-Jihād fī Al-Islām*, p. 94, 102-107; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, p. 245.

[80] Al-Shāfiʿī, *Al-Umm*, Vol. 4, p. 284; Ibn Taymiyyah, *Qāʿidah Mukhtaṣarah fī Qitāl al-Kuffār*, pp. 88 f.; Haykal, *Al-Jihād wa al-Qitāl*, Vol. 2, pp. 1252-1257, 1260; al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, pp. 108, 498-502. Ibn Ḥazm (d. 456/1064), of the extinct Ẓāhirī school, also accepts that these categories could be killed, see ʿAlī ibn Aḥmad ibn Saʿīd ibn Ḥazm, *Al-Muḥallā* (Beirut: Dār al-Āfāq al-Jadīdah, n.d.), Vol. 7, p. 296, see also on Ibn Ḥazm's position on these categories, for example, Haykal, *Al-Jihād wa al-Qitāl*, Vol. 2, p. 1269; Mahmassani, "The Principles of International Law in the Light of Islamic Doctrine", p. 302; Peters, *Islam and Colonialism*, p. 22; ʿAbd al-ʿAzīz Ṣaqr, *ʿAl-ʿAlāqāt al-Dawliyyah fī al-Islām Waqt al-Ḥarb: Dirāsah lil-Qawāʿid al-Munaẓẓimah li-Sayr al-Qitāl*, Mashrūʿ al-ʿAlāqāt al-Dawliyyah fī al-Islām 6 (Cairo: Al-Maʿhad al-ʿĀlamī lil-Fikr al-Islāmī, 1996), p. 49; Abū ʿĪd, *Al-ʿAlāqāt al-Khārijyyah*, p. 182; Copinger-Symes, "Is Osama bin Laden's '*Fatwa* Urging *Jihad* against Americans' dated 23 February 1998 Justified y Islamic Law?", p. 223.

[81] Khadduri, *The Islamic Law of Nations*, p. 58; Khadduri, *The Islamic conception of Justice*, pp. 165 f. See also Abou El Fadl, "Islam and the Theology of Power", p. 29; Copinger-Symes, "Is Osama bin Laden's '*Fatwa* Urging *Jihad* against Americans' dated 23 February 1998 Justified y Islamic Law?", pp. 51 f.

interpretations of the same sources, these two classical positions give two opposite Islamic legal justifications for recourse to war.

It is interesting to note here that modern Islamic writings on this point, though based on the interpretation of the same sources, take a different approach. While al-Shāfiʿī bases his position on the theory that the Qur'ānic texts 9:5 and 9:29 abrogated all other texts, while the majority of classical jurists based their position on the interpretation of Qur'ānic texts on war, as well as peace, overall, a growing trend among the majority of mainstream modern scholars takes an even wider approach that includes the totality of the Islamic message. It is based on the Qur'ānic principles that take into account the Islamic wisdom concerning human existence on earth, the Islamic worldview, and the principles of justice, human dignity and equality, as well as the interpretation of the Qur'ānic texts on war and peace in their context.[82]

This modern approach produces a diametrically opposite position to al-Shāfiʿī's. Modern scholars restrict the Islamic *casus belli* to the same categories given by the majority of classical jurists, namely, defence against aggression and *fitnah* (religious persecution). Furthermore, they affirm that, in Islam, peace is

[82] See, for example, Mahmassani, "The Principles of International Law in the Light of Islamic Doctrine", pp. 242-248; al-Zuḥaylī, "Islam and International Law", pp. 270-276; ʿAlī Jumʿah, "Al-Tasāmuh al-Islāmī fī Nuṣūṣ al-Sharʿ al-Sharīf", *Tolerance in the Islamic Civilization*, Researches and Facts, the Sixteenth General Conference of the Supreme Council for Islamic Affairs (Cairo: Supreme Council for Islamic Affairs, 2004/1425), pp. 57-80; Ṣūfī Ḥasan Abū Ṭālib, "Al-Islām wa al-Ākhar fī al-ʿAlāqāt al-Dawliyyah: Naẓrah ʿAmmah", *Tolerance in the Islamic Civilization*, Researches and Facts, the Sixteenth General Conference of the Supreme Council for Islamic Affairs (Cairo: Supreme Council for Islamic Affairs, 2004/1425), pp. 365-402; ʿAbd al-Ṣabūr Marzūq, "Al-Islām wa al-Jihād", *Tolerance in the Islamic Civilization*, Researches and Facts, the Sixteenth General Conference of the Supreme Council for Islamic Affairs (Cairo: Supreme Council for Islamic Affairs, 2004/1425), pp.789-810; Aḥmad Farrāj, "Al-Islām wa al-Ākhar fī al-ʿAlāqāt al-Dawliyyah: Mawqif al-Muslimīn fī al-ʿĀlam, al-Taʿāūn al-Islāmī min Ajl Salām al-ʿAlam", *Tolerance in the Islamic Civilization*, Researches and Facts, the Sixteenth General Conference of the Supreme Council for Islamic Affairs (Cairo: Supreme Council for Islamic Affairs, 2004/1425), pp. 403-432; Muḥammad al-Disūqī, "Uṣūl al-ʿAlāqāt al-Dawliyyah bayn al-Islām wa al-Tashrīʿāt al-Waḍʿiyyah", *Tolerance in the Islamic Civilization*, Researches and Facts, the Sixteenth General Conference of the Supreme Council for Islamic Affairs (Cairo: Supreme Council for Islamic Affairs, 2004/1425), pp. 575-610; Shitā, "Al-ʿAlāqāt al-Dawliyyah fī al-Islām", pp. 172-222; Badawi, "Muslim/Non-Muslim Relations", pp. 271-279.

intended to be the normal and permanent state of relation with the non-Muslims.[83] They advocate that, according to the Qur'ān (49:13; 60:8), Muslim relations towards non-Muslims are based on cooperation, justice and rapprochement.[84] Unlike the classical jurists, who formulated their theory in a time when a state of war already existed in the absence of a specific peace treaty, modern scholars advocate their position in a post-United Nations (UN) world. It is worth recalling here the new conception of jihād, discussed in Chapter Two, introduced by Abū al-Aʿlā al-Mawdūdī (1903-1979) and adopted by Sayyid Quṭb (1906-1966), which sees it as a permanent revolutionary struggle to abolish "oppressive political systems",[85]

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[83] See, for example, Sobhi Mahmassani, *Al-Qānūn wa al-ʿAlāqāt al-Dawliyyah fī al-Islām* (Beirut: Dār al-ʿIlm lil-Malāyīn, 1972/1392), pp. 77, 178-180; Mahmassani, "The Principles of International Law in the Light of Islamic Doctrine", pp. 249 f., 279; Peters, "Djihad", p. 286; Tawfīq Wahbah, *Al-Ḥarb fī al-Islām wa fī al-Mujtamaʿ al-Dawlī al-Muʿāṣir*, Kutub Islāmiyyah, Issue 145 (Cairo: Supreme Council for Islamic Affairs, 1973/1393), p. 41; Ḥāmīd Muḥammad ʿAlī Ḥirīshah, "Āyāt al-Jihād fī al-Qur'ān al-Karīm" (PhD thesis, al-Azhar University, Faculty of Uṣūl al-Dīn, Cairo, 1972), pp. 406 f.; ʿAfīfī, *Al-Mujtamaʿ al-Islāmī*, pp. 126 f.; al-Firjānī, *Uṣūl al-ʿAlāqāt*, pp. 31 f., 48, 187, 191; Ṣaqr, *Falsafah al-Ḥarb*, pp. 107-109; Ṭanṭāwī, "Al-Ḥukm al-Sharʿī fī Aḥdāth al-Khalīj", p. 57; Muḥammad Ra'fat ʿUthmān, *Al-Ḥuqūq wa al-Wājibāt wa al-ʿAlāqāt al-Dawliyyah fī al-Islām*, 4th ed. (Cairo: Dār al-Ḍiyā', 1991), p. 189; ʿUmar Mukhtār al-Qāḍī, "Al-Islām wa al-Qānūn: Ḍawābṭ wa Maʿāyyr al-ʿAlāqāt al-Dawliyyah al-ʿAmmah ʿalā Ḍaw' al-Mabādi' al-Islāmiyyah", in Fārūq Ḥamādah, ed., *Al-Tashrīʿ al-Dawlī fī al-Islām*, Nadawāt wa Munāẓarāt, No. 70 (Rabat: Kulliyyah al-Ādāb wa al-ʿUlūm al-Insāniyyah, 1997), p. 60; Sāmī al-Ṣaqqār, "Niẓām al-Amān fī al-Sharīʿah al-Islāmiyyah wa Āwḍāʿ al-Musta'minīn", in Fārūq Ḥamādah, ed., *Al-Tashrīʿ al-Dawlī fī al-Islām*, Nadawāt wa Munāẓarāt, No. 70 (Rabat: Kulliyyah al-Ādāb wa al-ʿUlūm al-Insāniyyah, 1997), p. 83; Muṣṭafā al-Sibāʿī, *Min Rawā'iʿ Ḥaḍāratinā* (Cairo: Dār al-Warrāq; Dār al-Salām, 1998/1418), pp. 73 f.; al-Zuḥaylī, "Majālāt al-ʿAlāqāt", p. 198; Naṣr Farīd Wāṣil, "Al-Islām Dīn Salām: Mafhūm al-Ḥarb wa al-Salām fī al-Islām", *Islam and the 21st Century*, Researches and Facts, the Tenth General Conference of the Supreme Council for Islamic Affairs (Cairo: Supreme Council for Islamic Affairs, 1999/1420), p. 277; Dāghī, "Al-Usus wa al-Mabādi' al-Islāmiyyah lil-ʿAlāqāt al-Dawliyyah", p. 169; Zawati, "Just War", p. 15; Zayd ibn ʿAbd al-Karīm al-Zayd, *Muqaddimah fī al-Qānūn al-Dawlī al-Insānī fī al-Islām* (N.p.: Comité International Genève, ICRC, 2004), pp. 12, 75; Krīmah, *Al-Jihād fī al-Islām*, pp. 35-41; ʿAbd al-Munʿim al-Ḥifnī, *Mawsūʿah al-Qur'ān al-ʿAẓīm* (Cairo: Maktabah Madbūlī, Vol. 2, 2004), Vol. 2, p. 1901; Muḥammad Fahād al-Shalāldah, *Al-Qānūn al-Dawlī al-Insānī* (Alexandria, Egypt: Munsha'ah al-Maʿārif, 2005), pp. 21 f.; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, pp. 401 f., 407, 423-447; Hashmi, "Interpreting the Islamic Ethics of War and Peace", p. 214; Badawi, "Muslim/Non-Muslim Relations", p. 279; Anisseh Van Engeland, "The Differences and Similarities between International Humanitarian Law and Islamic Humanitarian Law: Is there Ground for Reconciliation?", *Journal of Islamic Law and Culture*, Vol. 10, No. 1, April 2008, p. 83; Simbar, "The Changing Role of Islam in International Relations", pp. 57, 65. According to Farhad Malekian, "Islamic law basically promotes peaceful relations between all mankind and this theory should not be modified by the causes of war." See Farhad Malekian, *The Concept of Islamic International Criminal Law: A Comparative Study* (London: Graham & Trotman, 1994), p. 49; Alsumaih, "The Sunni Concept of Jihad", pp. 272, 305.

[84] See, for example, Sābiq, *Fiqh al-Sunnah*, Vol. 3, pp. 10-16.

[85] Sayyid Quṭb, *Milestones*, rev. trans. with a foreword by Ahmed Zaki Hammad (Indianapolis: American Trust Publication, 1993), p. 46. See also Sayyid Quṭb, *Fī Ẓilāl al-Qur'ān* (Beirut: Dār al-Shurūq, 1982), Vol. 3, pp. 1446 f.; Fawaz A. Gerges, *The Far Enemy: Why Jihad Went Global*

although it is not clear how and by whom this specific concept of jihād could be practically applied in reality in the contemporary world. Interestingly, moreover, the large part of this oppression, especially after the liberation of Muslims countries in the twentieth century, has been committed by Muslims regimes against their own people. This has partly contributed to the formulation of the concept of jihād against "the near enemy", i.e., Muslim regimes, discussed in Chapter Five.

Shaykh Muḥammad Abū Zahrah (1898-1974), a prominent and prolific twentieth-century author, in his *Al-Mujtamaʿ al-Insānī fī Ẓill al-Islām* (Human Society in the Shade of Islam) and *Al-ʿAlāqāt al-Dawliyyah fī al-Islām* (International Relations in Islam) shaped a modern approach to the subject of international relations in Islam. Abū Zahrah states that his study of this area is based on the texts of the Qur'ān and the Sunnah, i.e., sharīʿah, and the practice of those who abided by it, not on the "practices of [Muslim] kings who distorted the facts of the religion of Islam and [thus] from whom Muslims suffered more than the enemies of the Muslims."[86] Thus, he makes a clear distinction here between the normative theoretical laws of Islam and the un-Islamic practices of Muslims rulers throughout history. By making this important distinction at the beginning of his study, Abū Zahrah avoids a common major error in the study of Islamic international law, i.e., a confusion between the theory of Islam and the practice of the Muslims.

Before studying the Islamic laws of peace and war, Abū Zahrah states that Islamic international law, in times of both peace and war, is based on the following ten Islamic principles of human relations: (1) Human dignity;[87] (2) all humans are

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(Cambridge: Cambridge University Press, 2005), p. 4. See also on this new concept of jihād maintained by al-Mawdūdī and Quṭb, al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, pp. 393-404.

[86] Abū Zahrah, *Al-ʿAlāqāt al-Dawliyyah fī al-Islam*, p. 18.

[87] Abū Zahrah refers to both Qur'ānic and Ḥadīth texts as well as examples from the life of the Prophet; though only Qur'ānic references are given here. Qur'ān 17:70; 2:30-33; 45:12-13.

one nation;[88] (3) human cooperation;[89] (4) forbearance;[90] (5) freedom (liberty), which includes personal or group freedom, freedom of religion and freedom of self-determination;[91] (6) virtue either in time of peace or, specifically, during the conduct of war;[92] (7) justice;[93] (8) reciprocity; (9) *pacta sunt servanda*[94] and (10) friendship and preventing tyranny.[95]

Abū Zahrah thus confirms that, in Islam, peace is the normal and permanent state of international relation. According to the Qur'ān and Sunnah, war is permitted only in defence against aggression or *fitnah*.[96] All the Qur'ānic texts prohibit the initiation of aggression and violation of the Islamic *jus in bello* (rules regulating the conduct during war).[97] He likens war to surgery that must be performed – and restricted – to a certain diseased part of the body.[98] This position sums up the approach to, and core of, the modern theory of Islamic international law.

Two highly important recent contributions to the study of Islamic international law/relations have not been, unfortunately, referred to in Western

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[88] Qur'ān 4:1; 7:189; 30:22; 49:13.
[89] Qur'ān 5:2.
[90] Qur'ān 41:34; 7:199; 16:126-127.
[91] Qur'ān 2:256; 10:99.
[92] Qur'ān 2:190; 2:194.
[93] Qur'ān 5:8; 16:90; 57:25.
[94] Qur'ān 16:91-94.
[95] Qur'ān 60:8-9; 28:5. Abū Zahrah, *Al-ʿAlāqāt al-Dawliyyah fī al-Islām*, pp. 19-46. On the Islamic principle of *pacta sunt servanda*, see also, for example, Muḥammad Abū Zahrah, *Tanẓīm al-Islām lil-Mujtamaʿ* (Cairo: Dār al-Fikr al-ʿArabī, n.d.), pp. 41-43; Ṣaqr, *Falsafah al-Ḥarb*, p. 111-124; ʿAfīfī, *Al-Mujtamaʿ al-Islāmī*, p. 226; ʿAbd al-Bāqī Niʿmah ʿAbd Allah, *Al-Qānūn al-Dawlī al-ʿĀmm: Dirāsah Muqāranah bayn al-Sharīʿah al-Islāmiyyah wa al-Qānūn al-Waḍʿī* (Beirut: Dār al-Aḍwā', 1990/1410), p. 43; Hans Wehberg, "Pacta Sunt Servanda", *American Journal of International Law*, Vol. 53, 1959, p. 775; Pirzada, "Islam and International Law", pp. 210-215; Weeramantry, *Islamic Jurisprudence*, pp. 132 f.; El-Ayouty, "International Terrorism under the Law", p. 491; Malekian, *The Concept of Islamic International Criminal Law*, pp. 12 f.; Javaid Rehman, *Islamic State Practices, International Law and the Threat from Terrorism: A Critique of the 'Clash of Civilizations' in the New World Order* (Oxford: Hart Publishing, 2005), p. 46; Emilia Justyna Powell and Sara McLaughlin "The International Court of Justice and the World's Three Legal Systems", *The Journal of Politics*, Vol. 69, No. 2, May 2007, pp. 400 f.
[96] Abū Zahrah, *Al-ʿAlāqāt al-Dawliyyah fī al-Islām*, pp. 47-52, 89-94.
[97] Ibid., pp. 89-106.
[98] Muḥammad Abū Zahrah, *Al-Mujtamaʿ al-Insānī fī Ẓil al-Islām* (Cairo: Dār al-Fikr al-ʿArabī, n. d.), p. 148. Al-Sayyid Sābiq uses the same metaphor to describe war in Islam, see Sābiq, *Fiqh al-Sunnah*, Vol. 3, p. 44.

literature. The first is a ten-year research project on international relations in Islam[99] conducted by a group of twenty-seven academic specialists, mostly of Cairo University, in international relations, positive international law, Islamic history and political science. This encyclopaedic project, sponsored and published by the USA-based International Institute of Islamic Thought (IIIT), was published in Arabic in fourteen volumes in 1996. The second neglected contribution is the recent series of annual conferences of the Supreme Council for Islamic Affairs in Egypt (SCIA).[100] Muslim and non-Muslim academics and religious officials from all over the world contribute to this annual conference. The publication of these annual conference proceedings includes a number of papers and the recommendations, both in English and French.

The IIIT project on Islamic international relations settles the controversy between the classical exegetes and jurists over what determines the Islamic position with regard to non-Muslims. According to the project's findings, the Islamic position towards non-Muslims, namely peace or war, is determined by their response to Islamic *daʿwah* (the preaching of Islam). In other words, Muslims may resort to the use of force against their enemies if they prevent Muslims from preaching Islam,[101] as was also argued by the late Shaykh al-Azhar, Maḥmūd Shaltūt (see Chapter Two).[102] The last revealed Qur'ānic texts on fighting (9:5 and 9:29) show this

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[99] See on this project, Ali Ghanbarpour-Dizboni, "Islam and War: The Disparity between the Technological-Normative Evolution of Modern War and the Doctrine of Jihad" (PhD thesis, Université de Montréal, 2000), pp. 15-22.

[100] This observation has been noted in Ralph H. Salmi, Cesar Adib Majul and George K. Tanham, *Islam and Conflict Resolution: Theories and Practices* (Lanham, MD: University Press of America, 1998), p. 81.

[101] Ṣaqr, *ʿAl-ʿAlāqāt al-Dawliyyah*, pp. 7-29. See also Ghanbarpour-Dizboni, "Islam and War", pp. 28-30.

[102] See, for example, ʿAbd al-Ḥalīm Maḥmūd, "Al-Jihād", *Kitāb al-Mu'tamar al-Rābiʿ li-Majmaʿ al-Buḥūth al-Islāmiyyah* (Cairo: Majmaʿ al-Buḥūth al-Islāmiyyah, 1968/1388), p. 36; Ismaʿīl R. al-Faruqi, "Islam and Other Faiths: The World's Need for Humane Universalism", in Altaf Gauhar, ed., *The Challenge of Islam* (London: Islamic Council of Europe, 1978), p. 100; ʿAbd al-Salām Bilājī, "Sharīʿah al-Ḥarb fī al-Sīrah al-Nabawiyyah al-Sharīfah", in Fārūq Ḥamādah, ed., *Al-Tashrīʿ al-Dawlī fī al-Islām*, Nadawāt wa Munāẓarāt, No. 70 (Rabat: Kulliyyah al-Ādāb wa al-ʿUlūm al-Insāniyyah,

connection between Islam and war by stating that the *casus belli* are enemy hostility towards Islam and the breaking of a peace treaty with the Muslims.[103] Preaching the message of Islam to non-Muslims is an obligation of the Islamic state and includes several means such as: oral[104] or written preaching,[105] using all the modern means of communication, as well as patience in the face of religious persecution,[106] i.e., jihād in its wider sense.

It is obvious that Muslims have the intrinsic right to self-defence against aggression, but here lies the peculiar dimension of the Islamic conception of enemy hostility and aggression, which is considered a justifications for war in Islam: the non-Muslims' use of force to prevent the preaching of Islam is considered a justifications for the recourse to war, i.e., jihād in its limited sense, as Shaltūt states. Put differently, jihād's nature as either peaceful missionary activity or military struggle – as argued by Muḥammad Saʿīd Ramaḍān al-Būṭī (b. 1929) – depends on the attitude of others towards the preaching of Islam.[107] This peculiar dimension and the fact that the Islamic state is required, theoretically, or as was the case at least in the first century of Islam, to introduce Islam to non-Muslims, have added to the confusion about jihād. This confusion also comes from the facts that the Islamic position towards others is derived from the normative sources of Islam and is determined by the attitude of non-Muslims towards the religion of Islam.

1997), pp. 117 f.; Rudolph Peters, trans. and ed., *Jihad in Mediaeval and Modern Islam: The Chapter on Jihad from Averroes' Legal Handbook 'Bidayat Al-Mudjtahid' and The Treatise 'Koran and Fighting' by The Late Shaykh Al-Azhar, Mahmud Shaltūt* (Leiden: Brill, 1977), pp. 45, 51; Maḥmūd, "Al-Jihād wa Akhlāqiyyāt al-Ḥarb fī al-Islām", p. 852. See also ʿAfīfī, *Al-Mujtamaʿ al-Islāmī*, pp. 149-151; Wahbah, *Al-Ḥarb fī al-Islām*, pp. 21 f.; Maḥmūd Fayyāḍ, "Al-Siyāsah Al-Khārijiyyah lil-Islām", *Majalah al-Azhar*, December 1951/Rabīʿ al-Awwal 1371, pp. 204, 206; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, pp. 54 f., 241.

[103] Shitā, "Al-ʿAlāqāt al-Dawliyyah fī al-Islām", pp. 160-171.

[104] Like the expeditions the Prophet sent to preach Islam to the neighbouring tribes and in two of them - Mu'atah and al-Rajyyʿ - the preachers were assassinated.

[105] The Prophet's letters to kings and rulers inviting them to Islam is considered here a form of written preaching.

[106] An example of this is the thirteen years of patience in the face of religious persecution in Mecca.

[107] Muḥammad Saʿīd Ramaḍān al-Būṭī, *Ḥurriah al-Insān fī Ẓil ʿUbūdiyyatih li-Allah*, Hadhā Huwa al-Islām (Beirut: Dār al-Fikr al-Muʿāṣir; Damascus: Dār al-Fikr, 1992/1413), pp. 109-112.

Applying this theoretical Islamic paradigm of international relations to today's world would call for different means of introducing Islam to non-Muslims. Some have advocated that jihād at present takes the form of preaching through the Internet, the mass media and other missionary activities.[108] More importantly, relations between Muslims and others will be peaceful, on the basis of the facts that, in the post-UN world, no country is permitted to resort to unjustified force against Muslims and non-Muslim countries do not use force against the preaching of Islam, let alone protecting the religious freedom and accommodating the religious needs of Muslim minorities in non-Muslim countries.

The recent annual conferences of the SCIA have focused on Islamic international law following the Lewis-introduced, Huntington-developed, anticipatory theory of the "clash of civilizations". The titles of the 8th, 9th, 14th and 16th conferences sum up the main two themes of the current discussion of Islamic international law: first, advocating that – because of its just, peaceful, humane and, unlike positive international law, religiously and morally self-imposed principles[109]– Islamic international law is superior to international law[110] and, therefore, could

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[108] See al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, pp. 16, 207-211, 402 f., Vol. 2, pp. 1190-1192, 1194-1197; Peters, *Jihad in Classical and Modern Islam*, p. 117; Maḥmūd, "Al-Jihād wa Akhlāqiyyāt al-Ḥarb fī al-Islām", p. 859; Muhammad al-Atawneh, "*Shahāda* versus Terror in Contemporary Islamic Legal Thought: The Problem of Suicide Bombers", *Journal of Islamic Law and Culture*, Vol. 10, No. 1, April 2008, p. 21. On the utilization of the Internet by contemporary Muslims see, Gary R. Bunt, *iMuslims: Rewiring the House of Islam*, Islamic Civilization and Muslim Networks (Chapel Hill: University of North Carolina Press, 2009).

[109] See, for example, al-Ṣaqqār, "Niẓām al-Amān", p. 76; al-Disūqī, "Uṣūl al-ʿAlāqāt", p. 604; Mufīd Shihāb, "Al-Qānūn al-Dawlī wa al-Sharīʿah al-Islamiyyah", *Islam and the Future Dialogue between Civilizations*, Researches and Facts, the Eighth General Conference of the Supreme Council for Islamic Affairs (Cairo: N.p., 1998/1418), p. 335. See also, for example, al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, pp. 24, 159 f.; al-Zuḥaylī, *Al-ʿAlāqāt al-Dawliyyah*, pp. 9 f.; Khadduri, *The Islamic Law of Nations*, pp. 6, 41; Khadduri, *The Islamic conception of Justice*, p. 164; Mahmassani, "The Principles of International Law in the Light of Islamic Doctrine", p. 320; al-Zayd, *Al-Qānūn al-Dawlī al-Insānī*, pp. 23, 75 f.; Romahi, *Studies in International Law*, p. 44. Also on Islamic international humanitarian law as a part of the faith of, and thus a religious obligation on, the Muslims see, for example, Ahmed Zaki Yamani, "Humanitarian International Law in Islam: A General Outlook", *Michigan Yearbook of International Legal Studies*, Vol. 7, 1985, pp. 191, 215; Saleem Marsoof, "Islam and International Humanitarian Law", *Sri Lanka Journal of International Law*, Vol. 15, 2003, p. 23.

[110] Peters, *Jihad in Classical and Modern Islam*, pp. 137-148; Elbakry, "The Legality of 'War' in Al-Shariʿa Al-Islamiya", p. 234; Saʿīd Muḥammad Aḥmad Bānājah, *Al-Mabādi' al-Asāsiyyah lil-ʿAlāqāt*

better achieve world peace and security, and, second, refuting hostile and prejudiced Western scholarly attacks on Islam and its attitude towards non-Muslims.

Modern Muslim scholars of Islamic international law have to deal with new circumstances, which have rendered the classical theory "inoperative or even irrelevant",[111] because many essential concepts and rules of the classical theory of Islamic international law have become obsolete because of changes in the many

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*al-Dawliyyah wa al-Dublūmāsiyyah waqt al-Silm wa al-Ḥarb: Bayn al-Tashrīʹ al-Islāmī wa al-Qanūn al-Dawlī al-ʹĀmm* (Beirut: Mu'assasah al-Risālah, 1985), pp. 100, 113, 117 f., 134 f. Troy S. Thomas maintains that "Not only Islamic law generated a legal and moral doctrine, which is conceptually similar to Western constructs, but it also eclipses current international law in several aspects." Moreover, he concludes that "In many respects, *siyar* actually supersedes the Geneva Convention." See Troy S. Thomas, "Prisoners of War in Islam: A Legal Inquiry", *The Muslim World*, Vol. LXXXVII, No. 1, January, 1997, pp. 44, 52. Hans Kruse argues that "the positive international law of Europe had more than eight centuries later not yet reached the high degree of humanitarianization with which the Islamic law of war was imbued." See Hans Kruse *The Foundation of Islamic International Law*, 4, 1956, quoted in Bennoune, "Humanitarian Law in Islamic Jurisprudence", p. 639. Concerning Islamic international humanitarian law, Bennoune notes: "more than a millennium before the codification of the Geneva Conventions, most of the fundamental categories of protection which the Conventions offer could be found, in a basic form, in Islamic teachings." See Bennoune, "Humanitarian Law in Islamic Jurisprudence", p. 623; See also Ghanbarpour-Dizboni, "Islam and War", p. 14; Darwazah, *Al-Jihād fī Sabīl Allah*, p. 180; Abū Zayd ʽAbd al-Raḥman ʽAlī Rāḍī, "Al-Jihād fī Ḍaw' al-Sunnah: Asbābuh wa Kayfiyyatuh wa Natā'ijuh" (PhD thesis, Al-Azhar University, Cairo, 1976), p. 462; ʽUthmān, *Al-Ḥuqūq*, p. 211; S.K. Malik, *The Quranic Concept of War* (Lahore: Wajidalis, 1979), pp. 48 f.; Ṣaqr, *Falsafah al-Ḥarb*, p. 159. Roger C. Algase points out that "Islamic law is now being recognized by western writers in its true context as the oldest legal system containing detailed rules for warfare." See Roger C. Algase, "Protection of Civilian Lives in Warfare: A Comparison between Islamic Law and Modern International Law Concerning the Conduct of Hostilities", *Revue de Droit Pénal Militaire et de Droit de la Guerre*, Vol. 16, 1977, p. 247. Marcel A. Boisard indicates "that the fundamental postulates of the Muslim 'law of war' are particularly pertinent, repeating and, sometimes, in their substance, going beyond the norms decreed by the rules of the Hague and the Geneva Conventions." See Marcel A. Boisard, "The Conduct of Hostilities and the Protection of the Victims of Armed Conflict in Islam", *Hamdard Islamicus*, Vol. 1, No. 2, Autumn 1978, p. 13; Zawati concludes that "the substantive postulates of Islamic humanitarian law exceed the norms decreed by the Hague and the Geneva Conventions", see Zawati, *Is Jihad a Just War?*, p. 112; Judge Mohammed Bedjaoui, former Member of the International court of Justice, describes Islamic International law as "incredibly ahead of its time, so that its principles and rules, in particular so far as the conduct of war is concerned, fully stand comparison with those of present-day humanitarian law", see Mohammed Bedjaoui, "The Gulf War of 1980-1988 and the Islamic Conception of International Law", in Ige F. Dekker and Harry H.G. Post, eds., *The Gulf War of 1980-1988: The Iran-Iraq War in International Legal Perspective* (Dordrecht: Martinus Nijhoff, 1992), p. 282; also Saleem Marsoof, Judge, Court of Appeal, Sri Lanka, concludes that Islamic "rules relating to the conduct of war, the treatment of civilians, refugees and prisoners are more elaborate and just than even the rules contained in modern international conventions and protocols containing the principles of the modern International Humanitarian Law." See Marsoof "Islam and International Humanitarian Law", p. 27. Mahmasani concludes that "This defensive war [jihād], when permissible, is moreover subjected by Islamic jurisprudence to strict regulations and rules. In their humane character they were unparalleled in their time and are comparable in content only to modern regulations recognized to-day by international conferences and treaties." Mahmassani, "The Principles of International Law in the Light of Islamic Doctrine", p. 321; Mahmassani, *Al-Qānūn wa al-ʹAlāqāt*, p. 246.

[111] Salmi, Majul and Tanham, *Islam and Conflict Resolution*, p. 76. See also, for example, John Kelsay, *Islam and War: A Study in Comparative Ethics* (Louisville, KY: Westminster/John Knox, 1993, pp. 107 f.

circumstances upon which these rules were based. The most important of these circumstances is the abolition of the Islamic government system (caliphate) in 1924 and the "fragmentation" of the Muslim world into colonized or later, apart from Palestine, independent, sovereign, nation states. The second most important change is the establishment of the UN and agreement by all the countries of the world, for the first time in the history of the human race, to abide by one set of laws and to obligate themselves to "live together in peace".[112]

Since all Muslim countries have chosen to settle international disputes according to international law,[113] modern Islamic writings on Islamic international law merely make theoretical contributions which are not intended either to be applied in international society[114] or even, unfortunately, unlike the classical jurists' scholarly efforts, to give religiously-based rules for the conduct of the Islamic state in times of war. One of the reasons why Muslim countries have welcomed international law is that nothing in it contradicts the basic principles of Islamic international law,[115] namely, peace, justice and equality; indeed, it satisfies them. Furthermore, it puts Muslim countries, theoretically, on an equal legal footing with the colonial powers and provided legal justification for the liberation of their countries.[116] Nonetheless, Mufīd Shihāb,[117] a prominent Egyptian professor of international law and currently cabinet minister for the second time, criticised the organization of the United Nations at the eighth conference of the SCIA, arguing that

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[112] United Nations, *Charter of the United Nations and Statute of the International Court of Justice* (Geneva: United Nations, reprint, 1997), p. 3.
[113] Ibid., p. 5.
[114] See Peters, *Islam and Colonialism*, p. 163.
[115] See Maurits Berger, "Islamic Views on International Law", in Paul Meerts, ed., *Culture and International Law* (Hague: Hague Academic Press/T.M.C. Asser Press; West Nyack, NY: Cambridge University Press, 2008), pp. 105-117.
[116] See Abdullahi Ahmed An-Naʿim, *Towards an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Cairo: American University in Cairo Press, 1992), p. 152.
[117] Mufīd Shihāb was former President of Cairo University, Member of the Egyptian Society of International Law, former Minister of Egypt's Higher Education and the State for Scientific Research, and at present Minister of Legal and Parliamentary Councils.

it had failed as yet to achieve the most important principle it committed itself to achieve, i.e., "the principle of the sovereign equality of all its Members."[118] The power of veto held by the five permanent members of the Security Council undermines the principle of equality among the member states. He therefore advocates that Islamic principles and teachings could bring a humane and moral dimension to international relations.[119]

Modern Muslim writers also argue that history proves that Muslims have a superior and more peaceful record in their relations with others in comparison with that of the Christian/Western world. Gustave Le Bon is often quoted in this context as one of the fair-minded Western scholars who have acknowledged the fact that "history has never known a merciful and a just conqueror as the Arabs and that they left their conquered peoples free with their religion".[120] Historical examples are often given to show this superiority and the tolerance of Muslims towards others, such as the Constitution of Medina, the peaceful taking over of Mecca and the amnesty given to the Meccans (8/630), the pact of ʿUmar (17/638) safeguarding the religious freedom of the Christian of Jerusalem,[121] the model behaviour of the noble warrior

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[118] United Nations, *Charter of the United Nations*, p. 6.

[119] Shihāb, "Al-Qānūn al-Dawlī wa al-Sharīʿah al-Islamiyyah", pp. 336 f.

[120] This statement of Gustave Le Bon is quoted, for example, in the following: Āl Maḥmūd, *Al-Jihād al-Mashrūʿ*, p. 59; Jumʿah, "Al-Tasāmuḥ al-Islāmī", p. 75; Farrāj, "Al-Islām wa al-Ākhar", p. 430; al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, a quotation from the beginning of the book; al-Ṣaqqār, "Niẓām al-Amān", p. 80; Zawati, *Is Jihad a Just War?*, pp. 19 f.; Ṣaqr, *Falsafah al-Ḥarb*, pp. 106 f.; Bānājah, *Al-Mabādi' al-Asāsiyyah*, p. 99; Abū ʿĪd, *Al-ʿAlāqāt al-Khārijyyah*, p. 225; Ḥirīshah, "Āyāt al-Jihād", p. 396; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, p. 484.

[121] ʿAbd al-Raḥman Sālim, "Bayn al-ʿUhdah al-ʿUmariyyah wa ʿAhd Muḥammad al-Fātiḥ li-Ahālī al-Qusṭanṭīniyyah: Dirāsah Taḥlīliyyah Muqāranah", *Tolerance in the Islamic Civilization*, the Sixteenth General Conference of the Supreme Council for Islamic Affairs (Cairo: Supreme Council for Islamic Affairs, 2004/1425), pp. 1067-1077; Charis Waddy, *The Muslim Mind*, 3rd ed. (London: Grosvenor, 1990), p. 101; David Dakake, "The Myth of a Militant Islam", in Aftab Ahmad Malik, ed., *The State We Are in: Identity, Terror and the Law of Jihad* (Bristol: Amal Press, 2006), pp. 76 f.; al-Zuḥaylī, *Al-ʿAlāqāt al-Dawliyyah*, pp. 164 f. It is interesting to add here, as an example of the disparity between the insider and outsider approach in Islamic studies, that Western literature often refers to another completely different version of this pact imposing severe and bizarre restrictions on the religious freedom of Christians, though T.W. Arnold states that "De Goeje and Caetani have proved without doubt that they are the invention of a later age", see Arnold, *The Preaching of Islam*, p. 57. Also for refuting the possibility of concluding a pact that imposes such bizarre restrictions and attributing it to ʿUmar see, al-Ghunaimi, *Qānūn al-Salām fī al-Islām*, pp. 416-418. See also on this pact, Michael

Saladin (1138-1193) compared with the atrocities committed by the Crusaders,[122] the Christian persecution of Jews and Muslims in Spain,[123] the atrocities committed by European colonialists, the Native American genocide, the bombing of Hiroshima and Nagasaki,[124] the atrocities committed in World War One and World War Two and the atrocities committed by the Israelis against the Palestinians.

Ṣūfī Abū Ṭālib, a law professor and ex-speaker of the People's Assembly of Egypt (4 November, 1978 - 4 November, 1983), distinguishes the misinterpretation of some Biblical texts and the practice of some Christians throughout history, from the true Christian teachings of peace and love.[125] In Judaism, (Numbers 31:1-11; 33:50-53; Deuteronomy 2:16-17; 13:12-16; 20:10-16; Joshua 8:21-24; 1 Samuel 27:8-12; 2 Samuel 8:1-2; 13:26-31), he concludes, "the texts of the Old Testament indicate that the goals of war between the Jews and the other peoples are to capture other peoples' lands, expel them from their territories, and destroy them."[126] The Zionists after World War One, he adds, and "the contemporary leaders of the State of Israel are acting according to the texts of the Torah in expelling the Palestinians from their land, building Jewish settlements on it and perpetrating massacres such as 'Byer Sabʿ' and 'Qānā'".[127]

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Bonner, *Jihad in Islamic History: Doctrines and Practices* (Princeton: Princeton University Press, 2006), p. 88.

[122] Mahmassani, *Al-Qānūn wa al-ʿAlāqāt*, pp. 232 f.; al-Sibāʿī, *Min Rawā'iʿ Ḥaḍāratinā*, pp. 79-81; al-Shihābī, *Mafhūm al-Ḥarb*, pp. 87 f.; Ibrāhīm Aḥmad al-ʿAdawī, "Namādhij Tārīkhiyyah min al-Tasāmuḥ al-Islāmī: Ṣalaḥ al-Dīn wa Muʿāmalah al-Ṣalībiyyn wa Dustūr Ḥukm Madīnah al-Quds", *Tolerance in the Islamic Civilization*, Researches and Facts, the Sixteenth General Conference of the Supreme Council for Islamic Affairs (Cairo: Supreme Council for Islamic Affairs, 2004/1425), pp. 1125-1142; Farrāj, "Al-Islām wa al-Ākhar", p. 424. See Abū Ṭālib, "Al-Islām wa al-Ākhar", pp. 373 f.; Wahbah, *Al-Ḥarb fī al-Islām*, pp. 87 f.; ʿĀmir, *Aḥkām al-Asrā*, p. 148

[123] See Mahmassani, *Al-Qānūn wa al-ʿAlāqāt*, p. 232; al-Sibāʿī, *Min Rawā'iʿ Ḥaḍāratinā*, p. 83; Jumʿah, "Al-Tasāmuḥ al-Islāmī", p. 75; Abū Ṭālib, "Al-Islām wa al-Ākhar", p. 395.

[124] See, for example, al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, p. 749.

[125] See Abū Ṭālib, "Al-Islām wa al-Ākhar", pp. 390 f., 401; see also Maḥmūd, "Al-Jihād wa Akhlāqiyyāt al-Ḥarb fī al-Islām", pp. 844-847; ʿAfīfī, *Al-Mujtamaʿ al-Islāmī*, pp. 154 f.

[126] Abū Ṭālib, "Al-Islām wa al-Ākhar", p. 391. See also al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1. pp. 470, 591.

[127] Abū Ṭālib, "Al-Islām wa al-Ākhar", p. 401. See also al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1. p. 471.

The line of thought does not distinguish between the teachings of Judaism and Christianity and the practice of the followers of these religions, whether a disparity is believed to exist between the theory and practice in the case of Christianity and its followers, or a link is believed to exist in the case of Judaism and its contemporary followers in Israel, as argued above by Abū Ṭālib and reiterated by al-Qaraḍāwī in 2009.[128] Moreover, limiting the history of America to the genocide of the native Americans and the bombing of Hiroshima and Nagasaki, or the history of the Western Christian world to the Crusades and colonialism, and arguing that the atrocities committed against the Palestinians are perpetrated in accordance with the laws of the Torah, are examples of confusion among Muslims between the theory and practice of Judaism and Christianity.

### 3.4.2 Outsider Readings of Jihād

Unfortunately, a similar confusion between the teachings of Islam and the practices of some Muslims throughout history, and presenting these practices as being in conformity with Islamic teachings, is very common in current mainstream Western scholarly literature. The Islamic teachings on war, as presented in Western literature, are often limited to the Qur'ānic phrases calling upon Muslims to kill the polytheists wherever they find them,[129] without any study of the contexts or the interpretations of these phrases, even within their locutions or along with the rest of the relevant Qur'ānic texts on peace and war. This approach resembles the line of thought which

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[128] Al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1. pp. 470-472, 591.

[129] See, for example, Khadduri, *The Law of War and Peace*, pp. 5, 33; Khadduri, *War and Peace*, p. 163; Khadduri, *The Islamic Law of Nations*, p. 16; Abel, "Dār al-Ḥarb", p. 126; Suhas Majumdar, *Jihād: The Islamic Doctrine of Permanent War* (New Delhi: Voice of India, 1994), p. 16; John F. Whalen, "In Search of Jihad: Toward a Policy of Constructive Islamic Engagement", *The Brown Journal of World Affairs*, Vol. V, Issue 1, Winter/Spring 1998, p. 281; Raymond Ibrahim, "Are Judaism and Christianity as Violent as Islam?", *Middle East Quarterly*, Vol. XVI, No. 3, Summer 2009, pp. 3-12, available from http://www.meforum.org/2159/are-judaism-and-christianity-as-violent-as-islam; Internet; accessed 24 June 2009.

attributes the Israeli atrocities committed against the Palestinians to the teachings of Judaism[130] or at best to Jewish religious extremism.[131] In addition, modern Western literature is still influenced by the old Western school which portrayed Islam, in Rudolph Peters' words, as "a violent and fanatical creed, spread by savage warriors, carrying the Koran in one hand and a scimitar in the other."[132] Hence, portraying the Muslims as "bloodthirsty, lecherous fanatics" was used by Western colonialists to justify "their colonial expansion by the idea of a *mission civilisatrice*", Peters adds.[133]

Three contradictory motives for jihād are mainly given in outsider literature. First, jihād has been commonly presented in Western literature as the "equivalent to the Christian concept of the Crusade",[134] and thus has been always termed as "holy war" against non-Muslims.[135] This presentation and translation of jihād are based on an understanding of the aim of jihād, expressed by Khadduri, as "the universalization of religion [Islam] and the establishment of an imperial world state."[136] Put differently, quoting (Qur'ān 2:191), US Navy Lieutenant Commander John F.

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[130] See Muḥammad ʿImārah, *Al-Islām wa al-Ākhar: Man Yaʿtarif bi-Man? Wa Man Yunkir Man?*, 3rd ed. (Cairo: Maktabah al-Shurūq al-Dawliyyah, 2002), pp. 32-38; al-Shihābī, *Mafhūm al-Ḥarb*, pp. 145-154.

[131] See ʿAmr ʿAbd al-Laṭīf Hāshim, "Abʿād al-Ṣirāʿ al-ʿArabī al-Isrā'īlī", *Al-Ahrām*, 27 July, 2002, Issue No. 42236, p. 12. ʿAmr ʿAbd al-Laṭīf Hāshim is Egyptian former Deputy Foreign Minister.

[132] Peters, *Jihad in Classical and Modern Islam*, p. 108. See also Hans Küng, *Islam: Past, Present and Future*, Trans. John Bowden (Oxford: One World, 2007), pp. 3-6.

[133] Peters, *Jihad in Classical and Modern Islam*, p. 108. See also Peters, "Djihad", p. 282.

[134] Khadduri, *The Islamic Law of Nations*, p. 15. However, on the definition of jihād see his *The Islamic conception of Justice*, pp. 164 f.; Asma Afsaruddin, "Views of *Jihad* throughout History", *Religion Compass*, Vol. 1, Issue 1, 2007, p. 165.

[135] See, for example, Khadduri, *The Law of War and Peace*, p. 20; Ann Elizabeth Mayer, *Islam and Human Rights: Traditions and Politics*, 3rd ed. (Boulder, Colorado: Westview, 1999), p. 135. See also Alsumaih, "The Sunni Concept of Jihad", p. 38.

[136] Khadduri, *War and Peace*, pp. 51, 102. However, Khadduri expressed this aim in a different work as follows "the universalization of the faith [Islam] and the establishment of God's sovereignty over the world", see his, *The Islamic Law of Nations*, p. 15. See also Saleem Qureshi, "Military in the Polity of Islam: Religion as a Basis for Civil-Military Interaction", *International Political Science Review/ Revue internationale de science politique*, Vol. 2, No. 3, Civil-Military Relations, 1981, p. 275; Jalil Roshandel and Shadha Chadha, *Jihad and International Security* (New York: Palgrave Macmillan, 2006), p. 40; Charles Selengut, "Sacred Visions and Religious Terror: The Case of Islam" in David Bukay, ed., *Muhammad's Monsters: A Comprehensive Guide to Radical Islam for Western Audiences* (Green Forest, AR: Balfour Books, 2004), p. 42.

Whalen maintains that, “The highest duty of Islam, then, was to vanquish those who did not believe [in Islam].”[137]

Second, and in contradiction, Watt argues that, “Most of the participants in the [early Islamic, jihād] expeditions probably thought of nothing more than booty… There was no thought of spreading the religion of Islam.”[138] Similarly, Edward J. Jurji argues that the motivations of the Arab conquests were certainly not “for the propagation of Islam… Military advantage, economic desires, [and] the attempt to strengthen the hand of the state and enhance its sovereignty… are some of the determining factors.”[139] In his *Jihad in the West: Muslim Conquests from the 7th to the 21st Centuries*, Paul Fregosi claims that, “Even more than Allah, the prime motives for fighting that inspired the Arabs were plunder, slaves, women and the eagerness for death fighting for Islam.”[140] He concludes by emphasizing his bizarre claims that the pursuit of sex “helped them [Muslims] to conquer half the known world in less than one hundred years”.[141]

Third, in 1977 Peters concluded that, “The primary aim of the jihād is not, as it was often supposed in the older European literature, the conversion by force of unbelievers, but the expansion – and also defence – of the Islamic state”,[142] and he points out that the translation of jihād as “holy war” is therefore “strictly speaking, a wrong translation.”[143]

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137 Whalen, “In Search of Jihad”, p. 281.

138 W. Montgomery Watt, *Islamic Political Thought: Basic Concepts* (Edinburgh: Edinburgh University Press, 1980), p. 18.

139 Edward J. Jurji, “The Islamic Theory of War”, *The Muslim World*, Vol. 30, No. 4, 1940, pp. 333 f. See Alsumaih, “The Sunni Concept of Jihad”, pp. 37 f.

140 Paul Fregosi, *Jihad in the West: Muslim Conquests from the 7th to the 21st Centuries* (Amherst, New York: Prometheus, 1998), p. 66. Emmanuel Sivan claims that the Prophet fought “for dominance… over limited resources (above all water and grazing ground)”. Emmanuel Sivan, “The Holy War Tradition in Islam”, *Orbis*, Vol. 42, Issue 2, Spring 1998, p. 172.

141 Fregosi, *Jihad in the West*, p. 68.

142 Peters, trans. and ed., *Jihad in Mediaeval and Modern Islam*, p. 3. See also Thomas, “Jihad’s Captives”, p. 90.

143 Peters, trans. and ed., *Jihad in Mediaeval and Modern Islam*, p. 4. See also Watt, *Islamic Political Though*, p. 18; Elbakry, “The Legality of ‘War’ in Al-Shariʿa Al-Islamiya”, p. 239; Bernard Lewis,

The first/seventh century wars of the Islamic state are also a source of contradictions between Islamic and Western scholarship. While these wars are presented in the Western literature as holy wars against infidels or, recently, as wars of expansion for the Islamic state, the aims of these wars, as described by some Muslim scholars, were to "emancipate peoples, defend freedoms, establish human equality and spread justice".[144] Although ascertaining this description of the aims of these wars requires an investigation into every single instance, al-Qaraḍāwī states that throughout Islamic history no single incident of forced conversion has been recorded.[145] Despite Khadduri's hostile presentation of jihād as an "instrument" to "universalize" both Islam and the Islamic state,[146] he states that, "Islam as a religion was spread by trade and cultural connections beyond the frontiers of the state".[147] Furthermore, Khadduri even indicates that non-Muslim Arabs, including Christians, "joined the Muslim forces against their Persian and Byzantine masters".[148] Thus, Abū Zahrah and al-Qaraḍāwī maintain that these wars were just wars that liberated these peoples from the Roman and Persian tyranny.[149]

Nevertheless, on 12 September 2006, Pope Benedict XVI gave a lecture on faith and reason at the University of Regensburg in which he quoted the following

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*Islam and the West* (New York: Oxford University Press, 1993), p. 9; Badawi, "Muslim/Non-Muslim Relations", p. 271; Said Mahmoudi, "The Islamic Perception of the Use of Force in the Contemporary World", in Mashood A. Baderin, ed., *International Law and Islamic Law* (Aldershot: Ashgate, 2008), p. 111; Jerrold M. Post, "Reframing of Martyrdom and Jihad and the Socialization of Suicide Terrorists", *Political Psychology*, Vol. 30, No. 3, 2009. p. 382.

[144] Zawati, *Is Jihad a Just War?*, p. 49; Abū Zahrah, *Al-ʿAlāqāt al-Dawliyyah fī al-Islām*, p. 32; al-Zuḥaylī, "Islam and International Law", pp. 279 f.; al-Zuḥaylī, *Al-ʿAlāqāt al-Dawliyyah*, pp. 127- 129.

[145] Al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, p. 480. See also for the assertion that Islam "never allowed forced conversion of other people", see Mbaye Lo, "Seeking the Roots of Terrorism: An Islamic Traditional Perspective", *Journal of Religion and Popular Culture*, Vol. 10, Summer 2005. Available from http://www.usask.ca/relst/jrpc/art10-rootsofterrorism-print.html; Internet; accessed 9 June 2007.

[146] See, for example, Khadduri, *The Law of War and Peace*, pp. 30, 75.

[147] Khadduri, *The Islamic Law of Nations*, p. 11; see also, for example, al-Ghunaimi, *Qānūn al-Salām fī al-Islām*, p. 19. Al-Zuḥaylī states that Islam was spread by traders, jurists, judges and pilgrims. See al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, p. 71; al-Zuḥaylī, *Al-ʿAlāqāt al-Dawliyyah*, p. 34.

[148] Khadduri, *War and Peace*, p. 89.

[149] Abū Zahrah, *Al-ʿAlāqāt al-Dawliyyah fī al-Islām*, p. 32; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, pp. 268-371.

words of the fourteenth-century Byzantine emperor Manuel II Paleologus to a Persian scholar: "Show me just what Muhammad brought that was new, and there you will find things only evil and inhuman, such as his command to spread by the sword the faith he preached."[150] The Pope quotes this statement to argue that Islam is against reasoning, because "for Muslim teaching, God is absolutely transcendent. His will is not bound up with any of our categories, even that of rationality."[151] The remark about the spread of Islam by force triggered a massive reaction throughout the Muslim world.[152] This remark indicates that this mediaeval portrayal of Islam is still accepted at the highest levels of Western Christian circles.[153] Furthermore, it shows that this perception of the history and religion of Islam influences the current relationship between Islam and the West. But more significantly here, Muslim reaction to this remark indicates that Muslims reject the claim that Islam accepts spreading religion by force and even feel offended and that their history is being distorted by the claim that Islam was spread by force.

Thus, it is still being said that jihād is the Muslims' "instrument", or, for some, the Islamic equivalent of the Western Christian idea of holy war, to convert or subject non-Muslims. This shows that a disparity still exists between the insider and outsider understandings of jihād. It is interesting to quote here an American academic

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[150] Benedict XVI, *Faith, Reason and the University: Memories and Reflections*. A lecture given at the University of Regensburg, 12 September, 2006, available from http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/15_09_06_pope.pdf; Internet; accessed 15 August 2009; also available from http://www.vatican.va/holy_father/benedict_xvi/speeches/2006/september/documents/hf_ben-xvi_spe_20060912_university-regensburg_en.html; Internet; accessed 18 January 2007.

[151] Ibid.

[152] See a response of thirty eight worldwide Muslim leading religious figures to the Pope's remarks titled "Open Letter to His Holiness Pope Benedict XVI", available from http://www.dar-alifta.org/Viewstatement.aspx?ID=19; Internet; accessed 27 May 2007.

[153] For a survey of the Western Medieval views of Islam see, for example, R.W. Southern, *Western Views of Islam in the Middle Ages* (Cambridge, MA: Harvard University Press, 1962); David R. Blanks and Michael Frassetto, eds., *Western Views of Islam in Medieval and Early Modern Europe: Perception of Others* (Basingstoke: Macmillan, 1999). For the views of certain Western scholars of Prophet Muḥammad see, Jabal Muhammad Buaben, *Image of the Prophet Muḥammad in the West: A Study of Muir, Margoliouth and Watt* (Leicester: Islamic Foundation, 1996/1417).

who expressed this outsider's understanding in his comparison of Muslim and Christian recourse to war. Bruce Lawrence states that, "warfare remains a nefarious by-product of historical circumstances…an incidental *mythomoteur* for Christians, while it has been, and will continue to be, a foundational *mythomoteur* for Muslims of every generation."[154] Lawrence claims that for Muslims, as he says Ibn Khaldūn (d. 808/1406) maintains, warfare is intrinsic to history. Lawrence bases this claim about warfare in Islam on an obvious misunderstanding of Ibn Khaldūn's observation.[155] Khadduri explains that Ibn Khaldūn was "perhaps" the first Muslim to recognize that "wars were not, as his Muslim predecessors thought, casual social calamities. He maintained that war has existed in society ever since its 'Creation.'…Ibn Khaldūn's observation, which shows keen insight in understanding human history, is corroborated by modern research, which has demonstrated that early societies tended to be more warlike and that peace was by no means the normal state of affairs."[156] Thus Ibn Khaldūn, as Mahmassani also notes,[157] is here describing a human psychological phenomenon that has existed since the creation of

[154] Bruce Lawrence, "Holy War (*Jihad*) in Islamic Religion and Nation-State Ideologies", in John Kelsay and James Turner Johnson, eds., *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions* (Westport, Conn.: Greenwood Press, 1991), p. 144; see also the same statement in his "Reconsidering 'Holy War' (Jihād) in Islam", *Islam and Christian-Muslim Relations*, Vol. 1, No. 2, Dec. 1990, p. 265. See also Copinger-Symes, "Is Osama bin Laden's '*Fatwa* Urging *Jihad* against Americans' dated 23 February 1998 Justified y Islamic Law?", p. 218. For another example of such sweeping oversimplification, Daniel Brown maintains that in Islam: "War is justified at the macro level as a means of bringing humankind into proper relation to God, and at the individual level as a shortcut to paradise." See Daniel Brown, "Islamic Ethics in Comparative Perspective", *The Muslim World*, Vol. LXXXIX, Nol. 2, April, 1999, p. 190.

[155] Ibn Khaldūn states: "War and different kinds of fighting have always occurred in the world since God created it… It is something natural among human beings. No nation and no race (generation) is free from it." See ʿAbd al-Raḥman ibn Khaldūn, *The Muqaddimah: An Introduction to History*, trans. Franz Rosenthal (London: Routledge & Kegan Paul, 1958) Vol. 2, p. 73.

[156] Khadduri, *War and Peace*, pp. 70-72; Khadduri, *The Islamic conception of Justice*, p. 173.

[157] Mahmassani, "The Principles of International Law in the Light of Islamic Doctrine", p. 277. See also Noor Muhammad, "The Doctrine of Jihad: An Introduction", *Journal of Law and Religion*, Vol. 3, No. 2, 1985, p. 384.

humankind, not, as Lawrence claims, that the "cessation of warfare" is unthinkable to Muslims.[158]

Lawrence's statement actually contradicts the Muslim understanding of warfare. Khadduri refers to al-Ṭurṭushī (d. 520/1126-7) as describing wars as "social anomalies" and al-Ḥasan ibn ʿAbd Allah, who in 708/1308-9 compared wars "to diseases of society".[159] Moreover, Abū Zahrah's figurative reference to the recourse to jihād as "surgery", mentioned above, means that warfare is an exceptional necessary measure to stop an ongoing aggression (Qur'ān 2:251).[160] Jihād, thus, is not an act of warfare against the rest of mankind, as it is portrayed in some outsider literature,[161] since Abū Zahrah uses the simile of "surgery", which cannot be performed on, and is not needed by, the whole of the human body. Justice Jamāl al-Dīn Maḥmūd states that warfare is an exceptional necessity and, as the Qur'ān explains (2:216), it is hateful to human nature.[162] Other scholars add that warfare is considered "a necessary evil in exceptional cases sanctioned by Allah in defence of Islam, its protection, and as a deterrent against aggression."[163] In Islam warfare is thus, according to ʿAbbās al-Jarārī, advisor of the king of Morocco, "a crime and a violation to peace that is prohibited in Islam, unless it has just and legal justification".[164]

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[158] Lawrence, "Holy War (*Jihad*) in Islamic Religion and Nation-State Ideologies", p. 144.
[159] Khadduri, *War and Peace*, p. 72. See also Ḥammīdullāh, *Muslim Conduct of State*, p. 162.
[160] Abū Zahrah, *Al-Mujtamaʿ al-Insānī*, p. 148.
[161] See, for example, Reuven Firestone, *Jihād: The Origin of Holy War in Islam* (New York: Oxford University Press, 1999), p. 134; John Ralph Willis, "Jihad fi Sabil Allah-Its Doctrinal Basis in Islam and Some Aspects of Its Evolution in Nineteenth-Century West Africa", *The Journal of African History*, Vol. 8, No. 3, 1967, pp. 398, 414.
[162] Maḥmūd, "Al-Jihād wa Akhlāqiyyāt al-Ḥarb fī al-Islām", pp. 851 f.
[163] Zawati, "Just War", p. 12; Zawati, *Is Jihad a Just War?*, p. 10. See also Muḥammad ʿAbd Allah Draz quoted in Haykal, *Al-Jihād wa al-Qitāl*, Vol. 1, p. 587.
[164] ʿAbbās al-Jarārī, "Muʿādalah al-Silm wa al-Ḥarb fī Manẓur al-Islām", *Tolerance in the Islamic Civilization*, Researches and Facts, the Sixteenth General Conference of the Supreme Council for Islamic Affairs (Cairo: Supreme Council for Islamic Affairs, 2004/1425), p. 1192.

This sweeping and futuristic vision by Lawrence of warfare in Islam indicates a very obvious and practical problem in the study of Islam, namely, that Islamic literature is not usually adequately taken into account in Western studies of Islam. It is a practical problem in the sense that translations of books from Islamic languages into European languages are few and far between. This creates a gap between Islamic scholarship and its Western counterpart and studying the same old Western material on Islam will continue to produce the same old theories, more or less, with some minor modifications or developments. It is an obvious problem in the sense that to properly study a religion, a scholar needs to learn, among other disciplines, the languages in which the normative sources and materials of the religion are written.

Peters, a leading Western authority in the field, has studied a vast literature in Arabic that reflects the modern discussions of Islamic international law. Although his work is basically descriptive, in the sense that it merely summarizes the literature he discusses without adequate analysis, it is significant to find that his reaction to contemporary Muslim advocacy of jihād as a defensive just war and the superiority of the principles of Islamic international law to positive international law is sceptical.

Peters' repeated classification of modern writers as "highly apologetic"[165] implies that the motivation of these writers is primarily the defence of Islam, not simply advocating its teachings. He holds that both "modernist" and "fundamentalist" Muslim writers advocate their positions in reaction to what he calls "Western penetration". He therefore claims that the modernists are "adopting Western values and reforming their religion in the light of these newly imported ideas. They have transformed Islam into a religion that is well suited for the

[165] Peters, *Jihad in Classical and Modern Islam*, pp. 148, 110; see also his *Islam and Colonialism*, p. 163.

Westernized elite."[166] In addition, he claims that the fundamentalists "have reacted in a self-assertive manner, by rejecting everything Western and emphasizing the real Islamic values."[167] These two claims offer untenable interpretations of the so-called modernist and fundamentalist positions on Islamic international law. The claim that the modernists are reacting, adopting, reforming and further transforming their religion to suit Western "imported ideas" is an unjust judgement on the bases of these Islamic writings and their motivations. It even contradicts the belief generally maintained by Muslim and Western scholars that such writings are based on Islamic teachings, whether correctly or incorrectly attributed to the sharīʿah or the juridical judgements, for there is no doubt that these writings are based, as shown above, on the teachings of Islam, the Qur'ān and the Sunnah. Had this claim been true, the modernists would have been satisfied that such Islamic laws were simply compatible with Western laws, and would not also advocate the superiority of Islamic laws and Qur'ānic principles and suggest that they could better ensure a more equal and secure international society.

Moreover, these modern writers are reiterating the same Islamic *casus belli* as that given by the majority of the classical jurists of the second/eighth and third/ninth centuries, and, more importantly, any Islamic position, no matter how it is classified, is based on *an* understanding or *an* interpretation of the Qur'ān and Sunnah. The only change, as referred to above, is the introduction of Islamic positions corresponding to different sets of circumstances. Furthermore, the mere idea that the modernists would mould their religion in conformity to the Western model is far-fetched, bearing in mind that neither the modernists nor the fundamentalist are well acquainted with Western literature, simply because, again, of

[166] Peters, *Jihad in Classical and Modern Islam*, p. 133.
[167] Ibid.

the scarcity of translations of works on such subjects from European languages into Islamic languages. The familiarity they are claimed to have with Western ideas might be true for students of political science and positive law, which would explain why many modern Muslim writers on Islamic international law do not come from a religious educational background. Indeed, some of these students who have not had a religious education take a pride in finding that classical Muslim jurists addressed such matters,[168] as Peters notes, eight centuries before the birth of Hugo Grotius (1583-1645), the Dutch founder of International law,[169] who "himself drew heavily on Arabic works as is witnessed in Chapter X (article 3) of his Treatise [De Jure Belli ac Pacis]",[170] Syed Sharifuddin Pirzada confirms. Professor Christopher Gregory Weeramantry, Judge of the International Court of Justice (1991-2000), also argues persuasively and calls for further investigation into the question that Grotius was influenced by Islamic international law.[171] Hence, it is understandable that ʿAbd

[168] It is interesting to find that Ḥammīdullāh experienced this situation. In his words, Ḥammīdullāh relates: "At the instance of the League of Nations and with the warm support of the Head of the Law Faculty of the Osmania University, Public International Law was introduced in the Osmania LL.B. curriculum, and I happened to be in the front batch of students after this decision. It struck me at once that what was taught us as international law was identical in many respects with the teachings of the books of *Fiqh* and Muslim History." Ḥammīdullāh, *Muslim Conduct of State*, p. x.

[169] See, for example, al-Ghunaimi, *The Muslim Conception*, p. 83; al-Ghunaimi, *Qānūn al-Salām fī al-Islām*, pp. 60 f.; ʿAfīfī, *Al-Mujtamaʿ al-Islāmī*, p. 117; al-Ṣaqqār, "Niẓām al-Amān", pp. 75, 103; Dāghī, "Al-Usus wa al-Mabādi' al-Islāmiyyah lil-ʿAlāqat al-Dawliyyah", p. 185; ʿAbd al-Sattār Abū Ghuddah, "Murājaʿāt fī al-Fiqh al-Siyāsī al-Islāmī", *Scientific Review of the European Council for Fatwa and Research*, May 2007, Issues 10-11, Part 1, pp. 268 f.; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, p. 335; Majid Khadduri, "The Impact of International Law upon the Islamic World Order", *American Society of International Law Proceedings*, Vol. 66, 1972, p. 46; Weeramantry, *Islamic Jurisprudence*, p. 132; Ḥirīshah, "Āyāt al-Jihād", p. 406; Bennoune, "Humanitarian Law in Islamic Jurisprudence", p. 639 and footnote no. 205. Concerning Islamic international humanitarian law, Bennoune notes that: "more than a millennium before the codification of the Geneva Conventions, most of the fundamental categories of protection which the Conventions offer could be found, in a basic form, in Islamic teachings." Bennoune, "Humanitarian Law in Islamic Jurisprudence", p. 623. Here also Malekian confirms that "Islamic international criminal law was the first system of criminal law to codify rules for the conduct of international and non-international war. Islam provides for the precise rules during a state of war." Malekian, *The Concept of Islamic International Criminal Law*, p. 70.

[170] Pirzada, "Islam and International Law", p. 198. On the effect of Christian theology on the legal writings of Hugo Grotius see, Jeremy Thomas, "The Intertwining of Law and Theology in the Writings of Grotius", *Journal of the History of International Law*, Vol. 1, 1999, pp. 61-100.

[171] See Weeramantry, *Islamic Jurisprudence*, pp. 150-158.

al-Sattār Abū Ghuddah argues that it is al-Shaybānī, not Grotius, who is to be considered "the father of international law".[172]

Furthermore, Peters adds that modern Islamic writers maintain that, "European international law has been strongly influenced by the *Sharīʿa* via intercultural contacts during the Crusades and in Spain. E. Nys and Baron Michel de Taube were the first to assume a certain influence of Islamic law on Western international law."[173] Since many Muslims, as well as a few European scholars,[174]

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[172] Abū Ghuddah, "Murājaʿāt fī al-Fiqh al-Siyāsī al-Islāmī", p. 287. See also al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, p. 335.

[173] Peters, *Jihad in Classical and Modern Islam*, pp. 137 f. See also M. Cherif Bassiouni, ed., *A Manual on International Humanitarian Law and Arms Control Agreements* (New York: Transnational Publishers, 2000), pp. 9 f.; Pirzada, "Islam and International Law", p. 198.

[174] On the Islamic influence on Western International Law see, Najīb al-Armanāzī, *Al-Sharʿ al-Dawlī fī al-Islām*, 2nd ed. (Damascus: 1930; London: Riad El-Rayyes Books Ltd, 1990), pp. 88-90; Marcel A. Boisard, "On the Probable Influence of Islam on Western Public and International Law", *International Journal of Middle East Studies*, Vol. 11, No. 4, Jul., 1980, pp. 429-450; Ḥammīdullāh, *Muslim Conduct of State*, pp. 63-69; Mahmassani, "The Principles of International Law in the Light of Islamic Doctrine", p. 278; Bassiouni, ed., *A Manual on International Humanitarian Law*, pp. 9 f.; Pirzada, "Islam and International Law", p. 198; al-Ghunaimi, *The Muslim Conception*, pp. 82-86; al-Ghunaimi, *Qānūn al-Salām fī al-Islām*, pp. 60-66; ʿAfīfī, *Al-Mujtamaʿ al-Islāmī*, pp. 114 f.; Hasan Moinuddin, *The Charter of the Islamic Conference and Legal Framework of Economic Co-operation among its Member States: A Study of the Charter, the General Agreement for Economic, Technical and Commercial Co-operation and the Agreement for Promotion, protection and Guarantee of Investments among States of the OIC* (Oxford: Clarendon Press, 1987), pp. 42-45; Weeramantry, *Islamic Jurisprudence*, pp. 149 f.; Zawati, *Is Jihad a Just War?*, p. 108; Rehman, *Islamic State Practices*, p. 45. On the influence of "the Islamic doctrine of jihād" on the Western just war theory specifically through St. Thomas Aquinas see, Khadduri, *War and Peace*, p. 58. On the Islamic influence "on the law of war in the West", see Boisard, "The Conduct of Hostilities", p. 12. On "the historical contributions made by Islamic law to contemporary international humanitarian law" see Bennoune, "Humanitarian Law in Islamic Jurisprudence", pp. 605-643; Hashmi, "Saving and Taking Life in War", p. 158; Sohail Hashmi "Islamic Ethics and Weapons of Mass Destruction: An Argument for Nonproliferation", in Sohail H. Hashmi and Steven P. Lee, eds., *Ethics and Weapons of Mass Destruction: Religious and Secular Perspectives* (Cambridge: Cambridge University Press, 2004), p. 327; James Cockayne, "Islam and International Humanitarian Law: From a Clash to Conversation between Civilizations", *International Review of the Red Cross*, Vol. 84, No. 847, Sep. 2002, pp. 597-626. Manuel E.F. Supervielle agrees with Cockayne that Muslim countries have contributed to "the internationalization and humanization of European Law of War", see Manuel E.F. Supervielle, "Islam, the Law of War, and The U.S. Soldier", *American University International Law Review*, Vol. 21, 2005, p. 209. Judge Bedjaoui criticises that "Despite this [Islamic contribution], the West has either remained ignorant of the contribution of the Arabs and Islam to international law or has disregarded it. With the exception of a few highly specialized historians, Western scholars who have sought to trace back the history of international law have done so after their fashion without hardly ever thinking of the Islamic contribution. All over the world, even today, the great majority of treatises and manuals of international law short-circuit the history of international law by mentioning the contribution of Greco-Roman Antiquity and then calmly passing over the contribution which Islam made from the seventh to the 15th century", see Bedjaoui, "The Gulf War of 1980-1988 and the Islamic Conception of International Law", p. 294.

suggest this Islamic “influence” on international law, it would be contradictory to claim that Muslims “have transformed” Islamic laws to suit Western ideas.

Peters’ remark that the fundamentalists reject “everything Western” and emphasise “the real Islamic values” means that it is their rejection of Western ideas, and not their genuine belief in their respective interpretations of the Islamic sources, that drives them to hold certain positions. Peters’ description of the modernists’ writings as “apologetic” and the fundamentalists as “self-assertive”, and his claim that both are framing their religious positions in reaction to the West, are therefore groundless. Significantly, Peters’ description of the modern authors in phrases such as “our Muslim Panglosses”[175] implies that their advocacy of a peaceful Islamic theory of international law is regarded sceptically and without appreciation.

Lawrence’s statement describing war in Islam as a hostile permanent doctrine and Peters’ scepticism of what he describes as the modern Muslim advocacy of an Islamic “adequate legal system for maintaining peace in the domain of international relations”[176] represent the main two current attitudes regarding war and Islamic international law that are found in Western literature. Ignorance of, or failure to appreciate, the modern theory of Islamic international law as a potential theoretical contribution to the current system of international law, or at least as a laudable Islamic contribution to the global ethics of war and peace, undermines the possibility of developing such a global ethics.

[175] Peters, *Jihad in Classical and Modern Islam*, p. 148.
[176] Ibid.

### 3.5 Divisions of the World

Muslims jurists of the second/eighth century[177] developed a paradigm of international relations that divides the world into three conceptual divisions, *dār al-Islām*/*dār al-ʿadl/dār al-salām* (lit. house of Islam/house of justice[178]/house of peace), *dār al-ḥarb/dār al-jawr* (house of war/house of injustice, oppression) and *dār al-ṣulḥ*/*dār al-ʿahd/dār al-muwādaʿah* (house of peace/house of covenant/house of reconciliation). At the time, the "others" as far as Muslims were concerned were inevitably non-Muslim countries, for the very obvious reason that all Muslims of that time were politically united under one government, the institution of the caliphate, though at certain times there was more than one autonomous caliphate, some self-proclaimed. New territories were annexed to the growing Islamic state and, although they were considered to be within it, their Muslims were no more than a minority and it took them several centuries to become the majority.

An analysis of these three conceptual divisions confirms the conclusions of this study about the factors determining the nature of the relationship between Muslims and 'others' and thus specifying when jihād, in the sense of war, is permissible. Furthermore, it also clears up the uncertainty surrounding the position of religion in determining this relation.

#### 3.5.1 *Dār al-Islām/Dār al-ʿAdl/Dār al-Salām* (house of Islam/house of justice/house of peace)

Scholars give three different definitions of what constitutes the *dār al-Islām*. First, Abū Yūsuf (d. 182/798) and al-Shaybānī, the renowned scholars of the Ḥanafī school

[177] See Donner, "The Sources of Islamic Conceptions of War", p. 50; al-Ghunaimi, *The Muslim Conception*, p. 184.
[178] Al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, p. 170.

of law, Mālik, al-Shāfiʿī and Ibn Ḥanbal (d. 241/855),[179] the eponymous founders of the Mālikī, Shāfiʿī and Ḥanbalī schools of law, define it as the territory in which Islamic law is applied. It is also defined as the territory in which the *aḥkām* (sing. *ḥukm*, rules or rituals of Islam) exist or at least, for some, the free proclamation of the belief in Islam and the performance of prayers can be practised.[180] Others "even believe that a country remains *dār al-Islām* so long as a single provision (*ḥukm*) of the Muslim law is kept in force there."[181] Second, for al-Shawkānī it is a territory ruled by Muslims or in which the sovereignty belongs to Muslims.[182] But he maintains that "a territory can be considered *dār al-Islām*, even if it is not under Muslim rule, as long as a Muslim can reside there in safety and freely fulfil his religious obligations".[183] Third, for Abū Ḥanīfah, *dār al-Islām* is a territory in which Islamic law is applied and Muslims and *ahl al-dhimmah* (non-Muslim citizens of the *dār al-Islām*)[184] are safe.[185] Three criteria are thus proposed to identify *dār al-Islām*,

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[179] On the life and works of Ibn Ḥanbal see, al-Sibāʿī, *Al-Sunnah wa Makānatihā*, pp. 442-444; Doi, *Sharīʿah: The Islamic Law*, pp. 108-111; Weeramantry, *Islamic Jurisprudence*, p. 54.

[180] See Haykal, *Al-Jihād wa al-Qitāl*, Vol. 1. p. 665; al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, p. 169; Dandal Jabr, *Dār Al-Ḥarb: Dār al-Islām, al-Bilād al-Islāmiyyah, Dār al-Silm wa al-Amān, Dār al-ʿAhd, al-Must'minūn, al-Muʿāhadāt* (Amman: Dār ʿAmmār, 2004/1425), p. 11; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 2, p. 889; Khaled Abou El Fadl, "Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/eighth to the Eleventh/Seventh Centuries", *Islamic Law and Society*, Vol. 1, No. 2, 1994, pp. 161 f. Peters defines it as the territory in which Islamic rule and sharīʿah are applied, *Islam and Colonialism*, p. 11; Abū ʿĪd, *Al-ʿAlāqāt al-Khārijyyah*, p. 52.

[181] Abel, "Dār al-Ḥarb", p. 126.

[182] Muḥammad ibn ʿAlī ibn Muḥammad al-Shawkānī, *Al-Sayl al-Jarrār al-Mutadaffiq ʿalā Ḥadā'iq al-Azhār*, ed. Maḥmūd Ibrāhīm Zāyid (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1984-5/1405), Vol. 4, p. 575; Haykal, *Al-Jihād wa al-Qitāl*, Vol. 1, p. 664; Abū Zahrah, *Al-ʿAlāqāt al-Dawliyyah fī al-Islām*, p. 53; Khadduri, "The Islamic Theory of International Relations and Its Contemporary Relevance", p. 25; ʿAbd al-Karīm Zīdān, *Aḥkām al-Dhimmiyyn wa al-Musta'minīn fī Dār al-Islām* (Beirut: Mu'assasah al-Risālah; Baghdad: Maktabah al-Quds, 1982/1402), pp. 18 f.

[183] Zawati, *Is Jihad a Just War?*, p. 50.

[184] Hereafter *dhimmi* for singular and *dhimmis* for plural. On *dhimmis* in Islamic law see, Zīdān, *Aḥkām al-Dhimmiyyn*, pp. 22-45; ʿAfīfī, *Al-Mujtamaʿ al-Islāmī*, pp. 57-59, 87-90; Abū al-Aʿlā al-Mawdūdī, *Sharīʿah al-Islām fī al-Jihād wa al-ʿAlāqāt al-Dawliyyah*, trans. Samīr ʿAbd al-Ḥamīd Ibrāhīm (Cairo: Dār al-Ṣaḥwah, 1985/1406), pp. 222-232; Yūsuf al-Qaraḍāwī, *Non Muslims in the Islamic State*, trans. Khalil Muhammad Hammad and Sayed Mahboob Ali Shah (Indianapolis: American Trust Publication, 1985); Yūsuf al-Qaraḍāwī, *Al-Ḥalāl wa al-Ḥarām fī al-Islām*, 22nd ed. (Cairo: Maktabah Wahbah, 1997/1418), pp. 292 f.; Ismāʿīl Luṭfī Faṭānī, *Ikhtilāf al-Dārīn wa Atharuh fī Aḥkām al-Munākaḥāt wa al-Muʿāmalāt*, 2nd ed. (Cairo: Dār al-Salām, 1998/1418), pp. 113-125; al-Hindī, *Aḥkām al-Ḥarb wa al-Salām*, p. 13-18; Doi, *Sharīʿah: The Islamic Law*, pp. 426-435; Edward D.A. Hulmes "Dhimmis", in Ian Richard Netton, ed., *Encyclopedia of Islamic Civilization and Religion* (Oxford: Routledge, 2008), p. 144; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 2, pp. 911-956.

namely, the application of Islamic law or rituals, the sovereignty of Muslims, and the safety of the Muslims and the non-Muslim citizens of the Islamic state.

### 3.5.2 *Dār al-Ḥarb/Dār al-Jawr* (house of war/house of injustice, oppression)

It follows that *dār al-ḥarb* refers to territories in which these criteria are lacking. According to the first definition, it is a territory where Islamic law is not applied or where it is not safe to profess belief in Islam or perform prayers.[186] According to the second definition, *dār al-ḥarb* is a territory ruled by non-Muslims,[187] while for the third definition it is a territory in which the laws of Islam cannot be applied or exist and in which Muslims and *dhimmis* are not safe.[188] In other words, it is a territory in which freedom of religion does not exist and the lives of Muslims and *dhimmis* are not safe. Thus, the classifications of *dār al-ḥarb* and *dār al-Islām* refer to the existence or non-existence of safety and peace, specifically the freedom of Muslims to apply and practice Islamic law.[189] It is worth adding here that calling a territory *dār al-ḥarb* "did not mean actual fighting",[190] but it clearly indicated a potential state of hostility, enmity or war[191] in cases when territories did not belong to the *dār al-Islām* and did not have a peace treaty or alliance with it, and specifically if Islamic

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[185] AbuSulayman, *Towards an Islamic Theory of International Relations*, p. 19; Abou El Fadl, "Islamic Law and Muslim Minorities", p. 162, footnote no. 57; Abū ʿĪd, *Al-ʿAlāqāt al-Khārijyyah fī Dawlah al-Khilāfah*, pp. 51 f.; Wahbah, *Al-Ḥarb fī al-Islām*, p. 47; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 2, p. 889.

[186] Al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, p. 170; Salmi, Majul and Tanham, *Islam and Conflict Resolution*, p. 73; Faṭānī, *Ikhtilāf al-Dārīn*, pp. 30-35.

[187] See Manoucher Parvin and Maurie Sommer, "Dar al-Islam: The Evolution of Muslim Territoriality and its Implications for Conflict Resolution in the Middle East", *International Journal of Middle East Studies*, Vol. 11, No. 1, Feb., 1980, p. 3.

[188] AbuSulayman, *Towards an Islamic Theory of International Relations*, p. 20.

[189] Al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, pp. 172, 195 f.

[190] Salmi, Majul and Tanham, *Islam and Conflict Resolution*, p. 73. See also al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, p. 172; al-Zuḥaylī, *Al-ʿAlāqāt al-Dawliyyah*, p. 116; Marcel A. Boisard, *Jihad: A Commitment to Universal Peace* (Indianapolis, Ind.: American Trust Publications, 1988), p. 8; Weeramantry, *Islamic Jurisprudence*, p. 146; Thomas, "Jihad's Captives", pp. 89 f.; Elbakry, "The Legality of 'War' in Al-Shariʿa Al-Islamiya", pp. 305, 615 f.; Ghanbarpour-Dizboni, "Islam and War", p. 27.

[191] Khadduri, *The Islamic conception of Justice*, p. 163.

law could not be applied, Muslims were not safe to profess their belief in Islam and perform prayer, and the lives of Muslims and *dhimmis* were imperilled.

### 3.5.3 *Dār al-Ṣulḥ/Dār al-ʽAhd/Dār al-Muwādaʽah* (house of peace/[192]house of covenant/house of reconciliation)

*Dār al-ṣulḥ* or *dār al-ʽahd* refers to sovereign or semi-autonomous non-Muslim countries that entered into peace agreements with the Islamic state.[193] Treaties were made by which the non-Muslim territories paid *kharāj* (annual land tax); they did not pay *jizyah* because they were not living under the sovereignty of the Islamic state.[194] This tax was paid in return for the Islamic state's obligation to defend them from any foreign attacks. Alternatively, they were obliged to provide military support for the Islamic state. Other treaties stipulated that the two parties should exchange services or commodities, as in the treaties with the people of Nubia, Abyssinia, Cyprus and Armenia.[195] Furthermore, Muslim jurists commonly agreed that the Islamic state could give payment to their enemies to secure a truce in cases of necessity.[196]

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[192] Translated by Khadduri as "territory of peaceful arrangement", in his "The Islamic Theory of International Relations and Its Contemporary Relevance", p. 26; while Lewis translates it as "the House of Truce", Lewis, *The Crisis of Islam*, p. 42.

[193] See al-Armanāzī, *Al-Sharʽ al-Dawlī*, pp. 83 f.; Jabr, *Dār al-Ḥarb*, p. 40. See also Gawrych, "Jihad, War, and Terrorism", p. 4.

[194] Al-Zuḥaylī, *Al-ʽAlāqāt al-Dawliyyah*, p. 107; ʽAfīfī, *Al-Mujtamaʽ al-Islāmī*, p. 129; al-Hindī, *Aḥkām al-Ḥarb wa al-Salām*, p. 67; Jabr, *Dār al-Ḥarb*, p. 40.

[195] See, for example, Abū Zahrah, *Al-ʽAlāqāt al-Dawliyyah fī al-Islām*, p. 56; al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, pp. 175 f.; al-Zuḥaylī, "Islam and International Law", p. 278; al-Zuḥaylī, *Al-ʽAlāqāt al-Dawliyyah*, p. 108; Peters, *Islam and Colonialism*, p. 11; Safi, *Peace and the Limits of War*, p. 15; AbuSulayman, *Towards an Islamic Theory of International Relations*, p. 19; Khadduri, "The Islamic Theory of International Relations and Its Contemporary Relevance", p. 26; Parvin and Sommer, "Dar al-Islam", p. 4; al-Hindī, *Aḥkām al-Ḥarb wa al-Salām*, p. 67; al-Ghunaimi, *Qānūn al-Salām fī al-Islām*, p. 68. The peace and reconciliation treaty between the Nubians and the Muslims stipulated that the Nubians: "pay no tax but offer as a present three hundred slaves per annum; and that the Moslems offer them as a present food equivalent to the value of the slaves", see Aḥmad ibn Yaḥyā ibn Jābir al-Balādhūrī, *The Origins of the Islamic State: Being a Translation from the Arabic Accompanied with Annotations Geographic and Historic Notes of the Kitāb Futūḥ al-Buldān of al-Imām abu-l ʽAbbās Aḥmad Ibn Jābir al-Balādhuri*, Columbia University Studies in the Social Sciences, No. 163, trans. Philip Khūri Hitti (New York: AMS Press, 1968), Vol. I, p. 379.

[196] See, for example, Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 239; al-Armanāzī, *Al-Sharʽ al-Dawlī*, pp. 158 f.; Khadduri, *The Law of War and Peace*, p. 36; Alsumaih, "The Sunni Concept of Jihad", p. 142; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 2, pp. 822-824.

Blankinship notes that "the Umayyad governor even concluded a pact with the defeated Byzantine empire by which the Muslims were required to pay a tribute to the Byzantines in exchange for a truce".[197]

Thus, the *dār al-ṣulḥ* is a territory with which the *dār al-Islām* has a peace treaty, a non-aggression pact or an alliance. The concept of *dār al-ṣulḥ* or *dār al-ʿahd* was adopted by the Shāfiʿīs in the second/eighth century, though Donna E. Arzt strangely claims that, "the practical need of occasional truces gave rise to the conceptual development in the sixteenth century of a third 'territory,' *dar al-sulh* or the 'abode of peace,' also called *dar al-ahd*, 'abode of covenant.'"[198] According to al-Zuḥaylī,[199] the majority of jurists, including Abū Ḥanifah, did not accept the third conceptual division of the *dār al-ṣulḥ*, arguing that, if a territory concludes a peace treaty and pays tax to the *dār al-Islām*, it becomes a part of the *dār al-Islām* and thus the *dār al-Islām* is obliged to protect it.[200]

By analysing the three criteria of this conceptual division, it can be concluded that the factor determining relations with a non-Muslim state is, for one group of scholars, freedom to practise the religion of Islam, while for another group, most importantly Abū Ḥanifah, it is the safety of the Muslims and *dhimmis* from aggression. Concerning those who advocated that sovereignty is what determines

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[197] Blankinship, *The End of the Jihād State*, p. 23. Specifically, Blankinship adds that, ʿAbd al-Malik ibn Marwān (r. 685-705) "signed a ten-year truce with the Byzantines that required him to pay three hundred sixty-five thousand gold pieces, one thousand slaves, and one thousand horses per annum, an onerous and completely humiliating pact. In return, the Byzantines withdrew twelve thousand Mardaites (native Syrian Christian fighters) to Byzantine Armenia (Armenia IV)", see Blankinship, *The End of the Jihād State*, p. 27. Furthermore, in the words of Douglas E. Streusand: "several of the early caliphs made peace treaties with the Byzantine empire (some of which even required them to pay tribute [jizyah] to the Byzantines)." Douglas E. Streusand, "What Does Jihad Mean?", *Middle East Quarterly*, September, Vol. 4, pp. 9-18, 1997, available from http://www.meforum.org/357/what-does-jihad-mean; Internet; accessed 3 August 2007.

[198] Donna E. Arzt, "The Application of International Human Rights Law in Islamic States", *Human Rights Quarterly*, Vol. 12, No. 2, May 1990, p. 211.

[199] Al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, p. 176.

[200] See Khadduri, "The Islamic Theory of International Relations and Its Contemporary Relevance", p. 26; Peters, *Islam and Colonialism*, p. 11; Halil İnalcik, "Dār Al-ʿAhd", *Encyclopaedia of Islam*, New ed., Vol. II, p. 116; al-Zuḥaylī, *Al-ʿAlāqāt al-Dawliyyah*, p. 108.

whether a territory is a *dār al-Islām* or a *dār al-ḥarb*, it is obvious that, in their historical context, in a territory under the rule of Muslims Islamic law would be applied and Muslims' religious freedom and lives would be protected, but the religious freedom of Muslims living in territories under non-Muslim rule was possibly not protected.

It thus appears that there were two different theories behind the division of the world into two or three conceptual figurative territories. The first theory divides the world according to whether there is peace with, or aggression against, Islam and the lives of Muslims and *dhimmis*. This does not allow for the third division because, according to this view, if there is no aggression and there is a peace treaty with a specific territory, it is designated as *dār al-Islām* even if it is ruled and inhabited by non-Muslims. The criterion for this territorial division is not the belief or unbelief in the religion of Islam but, as indicated in the other two names for this territory, *dār al-ʿadl/dār al-salām*, whether there is justice and peace. The second theory, held by the Shāfiʿī jurists divides the world into Muslims/peace and non-Muslims/war. Thus they proposed the third division because, according to their formula, there is be peace though with non-Muslims.

These two theories correspond with the two positions held by jurists on the Islamic *casus belli*. The majority of jurists, who interpreted the Islamic *casus belli* as aggression against, or religious persecution of, Muslims, divided the world into two sectors: the territory of war and the territory of peace, depending on whether either of these two sorts of aggression existed, irrespective of the religious belief of the rulers or inhabitants of the territories concerned. This is in contrast to the Shāfiʿīs, who maintained that the Islamic *casus belli* is unbelief and who therefore envisioned the third division for cases when peace agreements were made with unbelievers.

Hypothetically applying this historical division to present-day Muslim countries, Wahbah al-Zuḥaylī and al-Qaraḍāwī, contemporary leading Muslim authorities on Islamic law, espouse Abū Ḥanīfah's criterion of safety for Muslims living in a given territory for it to be a *dār al-Islām*, even if Islamic law is not applied there. According to this criterion, they advocate that present-day Muslim countries be classified as *dār al-Islām* because Muslims are safe, though not all Islamic laws are applied.[201]

However, Muḥammad ʿAbd al-Salām Faraj, the author of a pamphlet entitled "Al-Farīḍah al-Ghā'ibah" (the absent duty, i.e., jihād), argues that modern-day Muslim countries are *dār al-kufr* (territory of unbelief) because of the widespread application of laws he calls *aḥkām al-kufr* (laws of unbelief), and that the Muslim rulers there are renegades from Islam. Furthermore, he claims that Muslim scholars agree that, if a Muslim group refuses to carry out some of the clear and established duties of Islam, such as performing the prayers, *zakāh*, fasting, pilgrimage, judging among people according to the Qur'ān and Sunnah, or refusing to prohibit wine and usury, they should be fought.[202] In fact, this is largely hypothetical and based on classical texts from a completely different context.

Present-day non-Muslim countries would thus be classified as *dār al-Islām* according to Abū Ḥanīfah's definition, since Muslims living there are safe, while in the opinion of other Ḥanafī jurists, al-Shaybānī and Abū Yūsuf, non-Muslim, as well as most Muslim, countries nowadays would be *dār al-ḥarb* because some parts of

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[201] Al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, p. 174; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 2, pp. 900 f.

[202] Muḥammad ʿAbd al-Salām Faraj, "Al-Farīḍah al-Ghā'ibah", published in *Al-Fatāwā al-Islamiyyah min Dār al-Iftā' al-Miṣriyyah* (Cairo: Al-Ahram Commercial Prints, 1993/1414), Vol. 10, pp. 3761-3791. The text of this pamphlet is translated into English in J.J.G. Jansen, *The Neglected Duty: The Creed of Sadat's Assassins and Islamic Resurgence in the Middle East* (New York: Macmillan, 1986), pp. 167-172.

Islamic law are not applied there.[203] Moreover, according to the opinion that accepts that Muslims should at least be safe to profess their belief in Islam and perform Islamic prayer, the whole world would be now *dār al-Islām*. However, after the establishment of the UN and the agreement by all the countries of the world "to live together in peace",[204] as Jaʿfar ʿAbd al-Salām, the Secretary General of the League of the Islamic Universities, points out that this whole theoretical, historical, circumstantial division has fallen into abeyance.[205]

After deciphering these three overlapping figurative sectors, this study therefore reaches the conclusion that what lay behind this division was not a religious criterion,[206] i.e., between Islam and other religions, as has been commonly and wrongly assumed.[207] Nor was it a territorial division between the Islamic state and the non-Muslim states. It was a division between peace and war, not only war against Muslims or the Islamic state, as concluded by al-Zuḥaylī,[208] but more importantly the prohibition of the practise[209] and preaching of the religion of Islam. Thus, Khadduri

[203] See Jabr, *Dār Al-Ḥarb*, p. 27.
[204] United Nations, *Charter of the United Nations*, p. 3.
[205] Jaʿfar ʿAbd al-Salām, "Naḥw Balwarah Muʿāṣirah lil-ʿAlāqah bayn al-Islām wa al-Ākhar", *Tolerance in the Islamic Civilization*, Researches and Facts, the Sixteenth General Conference of the Supreme Council for Islamic Affairs (Cairo: Supreme Council for Islamic Affairs, 2004/1425), p. 475; see also Muhammad Hashim Kamali, "Methodological Issues in Islamic Jurisprudence", *Arab Law Quarterly*, Vol. 11, No. 1, 1996, p. 11; Sohail H. Hashmi, "Is There an Islamic Ethic of Humanitarian Intervention?", *Ethics and International Affairs*, Vol. 7, 1993, p. 58; al-Ghunaimi, *Qānūn al-Salām fī al-Islām*, pp. 69, 71.
[206] Faṭānī, *Ikhtilāf al-Dārīn*, p. 77. Marcel A. Boisard notes that "the primary reality upon which the definition [of dār al-Islām] is based is not the religion of the population but the existence of specific institutions and the application of particular rules. .. A country can be called Islamic if, first of all, the laws it applies are Islamic, and if, secondly, the Muslims and protected minorities enjoy and the liberty to practice their religion, whether individually or collectively." See Boisard, *Jihad: A Commitment to Universal Peace*, p. 7.
[207] See, for example, Bassam Tibi, "War and Peace in Islam", in Sohail H. Hashmi, ed., *Islamic Political Ethics: Civil Society, Pluralism, and Conflict* (Princeton: Princeton University Press, 2002), pp. 176 f.; Salmi, Majul and Tanham, *Islam and Conflict Resolution*, p. 72; also despite its title, the following article reiterates some stereotypes about war in Islam, Pippi Van Slooten, "Dispelling Myths about Islam and Jihad", *Peace Review*, Vol. 17, Issue 2, 2005, pp. 292 f.
[208] Al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, p. 172.
[209] Ismāʿīl Luṭfī Faṭānī points out that *dār al-ḥarb* is the territory in which Muslims are not permitted to exercise their religious obligations. For this reason, Muslim scholars are unanimous that it is incumbent on Muslims living in such territories, he adds, to flee to the *dār al-Islām*, if they can. See Faṭānī, *Ikhtilāf al-Dārīn*, p. 96.

notes that if a Muslim "could safely reside and say his prayers, even though the law of the unbelievers was enforced, the territory might still be regarded, at least in theory, as a Muslim territory".[210] This further indicates the centrality of the religion of Islam in the formulation of the theory of international law in Islam and also affirms the conclusion of the IIIT project that it is non-Muslims' reaction to the preaching of the religion of Islam that determines whether Muslims would be in a state of peace or war with them.

It is worth adding here that, as pointed out by ʿAbd al-Raḥman al-Ḥāj, the classical jurists coined thirty-four conceptual divisions related to the word *dār*, including *dār al-muhājirīn*, *dār al-hijrah*, *dār al-baghy*, *dār al-daʿwah*, *dār al-dhimmah*, *dār al-riddah*, *dār al-shirk* and *dār al-ʿArab*,[211] and all these terms refer the historical realities of a broad range of divisions of the world as conceptualized by the classical jurists who lived during the period when such terms were being formulated. It is therefore unfortunate that all these juridical political concepts are ignored, so that the Islamic world view is oversimplified as one of perpetual war between Muslims and so-called infidels.

It is generally believed that this conceptual division of the world developed by the jurists of the second/eighth century was the product of their political "historical circumstances and context"[212] and for this reason – let alone that it had no

[210] Khadduri, *War and Peace*, p. 156. See also ʿAbd al-Qādir ʿAwdah, *Criminal Law of Islam*, trans. Zakir Aijaz (New Delhi: Kitab Bhavan, reprint 2005), Vol. I, p. 332. On Muslim minorities in Islamic law, see Abou El Fadl, "Islamic Law and Muslim Minorities", pp. 141-187.

[211] ʿAbd al-Raḥman al-Ḥāj, "Al-Manẓūr al-Fiqhī wa al-Taqsīm al-Qur'ānī lil-Maʿmūrah", *Islāmiyyah al-Maʿrifah*, Issue 45, Summer 2006/1427, p. 74.

[212] Abou El Fadl, "Islam and the Theology of Power", p. 29; and his *The Greater Theft: Wrestling Islam from the Extremists* (New York: HarperOne: 2007), pp. 223-232; Hashmi, "Interpreting the Islamic Ethics of War and Peace", p. 208; Kelsay, *Islam and War*, p. 60; Zawati, *Is Jihad a Just War?*, p. 50; Abū Zahrah, *Al-ʿAlāqāt al-Dawliyyah fī al-Islām*, p. 51; Mahmassani, *Al-Qānūn wa al-ʿAlāqāt*, p. 77; ʿAbd al-Salām, "Naḥw Balwarah Muʿāṣirah lil-ʿAlāqah bayn al-Islām wa al-Ākhar", p. 475; al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, pp. 130-135, 192 f., 194 f., 218; al-Zuḥaylī, *Al-ʿAlāqāt al-Dawliyyah*, pp. 17-22, 102, 114; Haykal, *Al-Jihād wa al-Qitāl*, Vol. 1. p. 848; Abū ʿĪd, *Al-ʿAlāqāt al-Khārijyyah*, pp. 49 f.; al-Firjānī, *Uṣūl al-ʿAlāqāt*, p. 22; Saʿīd ʿAbd Allah Ḥārib al-Mahīrī, "Al-Siyāsah wa al-Dīn bayn al-Mabādi' wa al-Tārīkh", *Scientific Review of the European Council for*

basis in the Qur'ān and the ḥadīth – [213] this conceptual figurative division soon collapsed or, more precisely, soon "became a fiction", as Hashmi puts it.[214] However, Tibi and Sachedina unwarrantedly assume that the division of the world into *dār al-Islām* and *dār al-ḥarb* "was based on the jurists' inference from the (implicit) Qur'ānic division of the world into the spheres of 'belief' (*iman*) and 'disbelief' (*kufr*)".[215] Sachedina does not refer to any Qur'ānic texts from which this twofold division of the world could be inferred, leaving aside the third division. It is obvious that there is no text that either explicitly or even implicitly divides the world between "belief and unbelief". The Qur'ān addresses certain incidents involving relations between people of four different religious affiliations, i.e., Muslims, idolaters, people of the book, and those called "the hypocrites". If there were such implicit divisions in the Qur'ān to warrant such an inference, it would not have taken classical Muslims over a century to infer it. Moreover, it would have been more reasonable that the Muslims would have inferred it when they were the victims of aggression during the Prophet's lifetime in Mecca or Medina and thus such divisions would not have collapsed so fast. Khadduri's definition of the *dār al-Islām* as "the Islamic *and non-Islamic territories* [emphasis added] held under Islamic

*Fatwa and Research*, May 2007, Issues 10-11, Part 1, pp. 384 f.; al-Ḥāj, "Al-Manẓūr al-Fiqhī", pp. 69-73; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 2, p. 881.

[213] Mahmassani, *Al-Qānūn wa al-ʿAlāqāt*, p. 77; al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, p. 193; al-Zuḥaylī, "Islam and International Law", p. 278; al-Zuḥaylī, *Al-ʿAlāqāt al-Dawliyyah*, pp. 114 f.; al-Firjānī, *Uṣūl al-ʿAlāqāt*, p. 22; al-Ghunaimi, *The Muslim Conception*, p. 184; Hashmi, "Interpreting the Islamic Ethics of War and Peace", p. 208; Moinuddin, *The Charter of the Islamic Conference*, p. 21; Abou El Fadl, *The Greater Theft*, pp. 226 f.; Afsaruddin, "Views of *Jihad*", p. 167; al-Mahīrī, "Al-Siyāsah wa al-Dīn", pp. 384 f.; al-Ḥāj, "Al-Manẓūr al-Fiqhī", pp. 69 f.; Shah, *Self-Defense in Islamic and International Law*, pp. 32, 35, 43; Van Engeland, "The Differences and Similarities between International Humanitarian Law and Islamic Humanitarian Law", p. 84; Copinger-Symes, "Is Osama bin Laden's '*Fatwa* Urging *Jihad* against Americans' dated 23 February 1998 Justified y Islamic Law?", p. 53; Simbar, "The Changing Role of Islam in International Relations", p. 59; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 2, p. 881.

[214] Hashmi, "Interpreting the Islamic Ethics of War and Peace", p. 207; Afsaruddin, "Views of *Jihad*", p. 167.

[215] Sachedina, "The Development of *Jihad* in Islamic Revelation and History", pp. 37 f.; Tibi, "War and Peace in Islam", p. 177; see also Bonderman, "Modernization and Changing Perceptions of Islamic Law", p. 1170.

sovereignty…[which] included the community of believers as well as those who entered into an alliance with Islam"[216] goes against this assumption of a division between belief and unbelief.

In fact, the classical Muslim jurists' mention of these divisions shows that their aim was to lay down Islamic rulings to regulate, for example, the actions of Muslim individuals residing in *dār al-ḥarb*, i.e., Muslims who converted to Islam without emigrating to *dār al-Islām*, and Muslims entering *dār al-ḥarb* to conduct business transactions,[217] marriage and other related issues between male Muslims and the non-Muslim inhabitants of the *dār al-ḥarb*,[218] and the Muslim army and its members during and after periods of fighting against the *dār al-ḥarb*. Jurists also set rulings for the non-Muslim residents of the *dār al-ḥarb* who entered *dār al-Islām*. The main concerns of the jurists who addressed these situations were mainly: first, to regulate the conduct of Muslims according to the dictates of the Qur'ān, the Sunnah and judgements based on these sources and the secondary sources of Islamic law; and second, to ensure that Muslims, especially those living in *dār al-ḥarb*, were able to practise Islam. This led Muslim jurists to discuss two important issues that may explain further the meaning of these theoretical divisions. The first is the obligation of *hijrah* (flight) to *dār al-Islām* for Muslim residents in *dār al-ḥarb* who were unable to practise Islam without persecution, for example, in cases when they were unable to perform prayers and fasting, etc. But if their persecutors forced them to

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[216] Khadduri, "The Islamic Theory of International Relations and Its Contemporary Relevance", p. 25.
[217] See, for example, ʿAlī ibn Sulaymān al-Mirdāwī, *Al-Inṣāf fī Maʿrifah al-Rājiḥ min al-Khilāf ʿalā Madhhab al-Imām Aḥmad Ibn Ḥanbal*, ed. Muḥammad Ḥamid al-Fiqī (Beirut: Dār Iḥyā' al-Turāth al-ʿArabī, n.d.), Vol. 4, p. 257, Vol. 5, pp. 52-54; al-Shāfiʿī, *Al-Umm*, Vol. 4, p. 247, Vol. 7, p. 361. On financial transaction between the *dār al-Islām* and the *dār al-ḥarb* see, Faṭānī, *Ikhtilāf al-Dārīn*, pp. 371-446.
[218] See, for example, Muḥammad ibn Aḥmad ibn Abī Sahl al-Sarakhsī, *Uṣūl al-Sarakhsī* (Beirut: Dār al-Maʿrifah, n.d.), Vol. 2, p. 256; al-Jaṣāṣ, *Aḥkām al-Qur'ān*, Vol. 5, p. 329; Muḥammad ibn Abī Bakr ibn Qayyim al-Jawziyyah, *Aʿlām al-Muwaqqiʿīn ʿan Rabb al-ʿĀlamīn*, ed. Ṭaha ʿAbd al-Ra'ūf Saʿd (Beirut: Dār al-Jīl, 1973), Vol. 3, p. 152; al-Shāfiʿī, *Al-Umm*, Vol. 4, pp. 272, 283, Vol. 5, p. 151; al-Mirdāwī, *Al-Inṣāf*, Vol. 8, p. 135; Faṭānī, *Ikhtilāf al-Dārīn*, pp. 156-334.

stay, or if they could not emigrate because of illness or, in cases of women, children and the elderly, they were exempted from the obligation to emigrate.[219] The second issue, which led to a controversy among jurists, is the jurisdiction of the *dār al-Islām* over crimes committed by Muslims outside the *dār al-Islām*[220] and crimes committed by temporary residents in the *dār al-Islām*. All this shows that the aim of this division was not, as it has been portrayed, an oversimplified formula according to which the *dār al-Islām* is to wage war against the *dār al-ḥarb* until the latter "is reduced to non-existence."[221]

This shows that discussions of these concepts have been highly superficial, in the sense that mistaken assumptions have been simply based on the literal meanings of these three figurative concepts, without investigating how they were defined by the jurists. As a result, the basic concepts that define the parameters of what constitutes peace and war in Islam have not been thoroughly studied and thus wrong assumptions have developed into widely believed theories about that subject. These concepts are still attracting clichés and, even worse, serious conclusions have been based on these assumptions. For example, influenced by Khadduri's understanding

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[219] See, for example, Ibn Qudāmah, *Al-Mughnī*, Vol. 9, pp. 236 f.; Muwaffaq al-Dīn ʿAbd Allah ibn Aḥmad ibn Qudāmah, *'Umdah al-Fiqh*, ed. ʿAbd Allah Safar al-ʿAbdalī and Muḥammad Dughaylib al-ʿUtaybī (Taif: Maktabah al-Ṭarafayn, n.d.), p. 157; al-Nawawī, *Al-Majmūʿ*, Vol. 21, pp. 3-8; Ibrāhīm ibn ʿAlī ibn Yūsuf al-Shirāzī, *Al-Muhadhdhab: Fī Fiqh al-Imām al-Shāfiʿī*, ed. Zakariyyā ʿImīrat (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1995/1416) Vol. 3, p. 265; al-Mirdāwī, *Al-Inṣāf*, Vol. 4, p. 121; al-Armanāzī, *Al-Sharʿ al-Dawlī*, p. 85.

[220] See, for example, al-Kāsānī, *Badāiʿ al-Ṣanāiʿ*, Vol. 7, pp. 34, 80; al-Jaṣāṣ, *Aḥkām al-Qur'ān*, Vol. 5, p. 100; Ibn Qayyim al-Jawziyyah, *Aʿlām al-Muwaqqiʿīn*, Vol. Vol. 2, pp. 218, 226, Vol.3, pp. 5-7; Ibn Mawdūd, *Al-Ikhtiyār*, Vol. 4, p. 96; Ibn Najīm, *Al-Baḥr al-Rā'iq*, Vol. 5, p. 55; ʿAwdah, *Criminal Law of Islam*, Vol. I, pp. 335-347; Frank E. Vogel, "The Trial of Terrorists under Classical Islamic Law", *Harvard International Law Journal*, Vol. 43, No. 1, Winter 2002, p. 53, footnote no. 1.

[221] Khadduri, *War and Peace*, p. 64. However, Khadduri gives a different objective of this formula. In another work, he claims that "In theory the *dar al-Islam* was always at war with the *dar al-harb*. The Muslims were under legal obligation to reduce the latter to Muslim rule in order to achieve Islam's ultimate objective, namely, the enforcement of God's law (the *Shai'a*[*h*]) over the entire world." See Majid Khadduri, "Islam and the Modern Law of Nations", *American Journal of International Law*, Vol. 50, No. 2, Apr. 1956, p. 359. Also on this formula, Stephen Akpiok-bisa Agilinko claims that "as long as there is a territory that lies outside of the *dar al-Islam* it is incumbent on the *umma* to wage war till such a time that the *dar al-harb* is no more." Stephen Akpiok-bisa Agilinko, "A Comparative Study of the Just War and Islamic Jihad Traditions: An Analytical Approach" (M.A. diss., University of Lancaster, 2002), p. 44.

of jihād as permanent war against the *dār al-ḥarb*,[222] Donna E. Arzt concludes that, "the doctrine of *Jihad* and the two 'abodes,' war and Islam – to which the vast majority of orthodox Muslim scholars still subscribe, at least in theory – are clearly incompatible with the fundamental premise of modern international law: peaceful coexistence between coequal states."[223] Apart from the strange allegation that Muslim scholars still subscribe to these concepts, Arzt here bases this firm conclusion on the stereotypical portrayal of the Islamic theory of international law as a simple formula of war against unbelievers.

This proves that, while modern Muslim writings are almost ignored, the classical Islamic theory of international law has been widely distorted in Western literature. One of the reasons for this is that concepts or theories developed by Muslims of any period in Islamic history, no matter how deeply studied or understood, have been and probably will be presented in the future, specifically by outsider scholars, as permanent Islamic doctrines or laws.[224] This is simply because this approach confuses divine laws, namely the sharīʿah, with the scholarly interpretations and formulations of theories, laws and concepts. Wrong conclusions on Islamic international law are reached when the laws or concepts of particular

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[222] See Donna E. Arzt, "Heroes or Heretics: Religious Dissidents under Islamic Law", *Wisconsin International Law Journal*, Vol. 14, No. 2, Spring 1996, p. 379.

[223] Arzt, "The Application of International Human Rights Law in Islamic States", p. 214.

[224] For a glimpse of the basic structure and change in Islamic law, see, for example, Kamali, "*Fiqh* and Adaptation to Social Reality", pp. 62-84; Jackson, "Jihad and the Modern World", pp. 7-10; Bustami Muḥammad Khir, "Ārā' Muʿāṣirah ʿan Taghyyir al-Aḥkām bi-Taghyyir al-Zamān" [article online]; available from http://www.midad.me/arts/view/aut/21711; Internet; accessed 25 August 2009; Zahraa, "Characteristic Features of Islamic Law", pp. 168-196; Ahmad Zaki Yamani, "The Eternal *Sharīʿa*", *New York University Journal of International Law and Politics*, Vol. 12, 1979, pp. 205-212; Majid Khadduri, "The *Maslaha* (Public Interest) and *ʿIlla* (Cause) in Islamic Law", *New York University Journal of International Law and Politics*, Vol. 12, 1979, pp. 213-217; J.N.D. Anderson, "Is the Shariʿa Doomed to Immutability?", *The Muslim World*, Vol. LVI, No. 1, *January* 1966, pp. 10-13; Malcolm Kerr, "Rashid Riḍā and Islamic Legal Reform: An Ideological Analysis, Part I. Methodology", *The Muslim World*, Vol. L, No. 2, April 1960, pp. 99-108; and his "Rashid Riḍā and Islamic Legal Reform: An Ideological Analysis, Part II. Application", *The Muslim World*, Vol. L, No. 3, July, 1960, pp. 170-181. For a discussion of the source and schools of Islamic law and a survey of materials in Arabic, English and French, see John Makdisi, "Islamic Law Bibliography", *Law Library Journal*, Vol. 78, 1986, pp. 103-190.

historical times and contexts are compared or applied to a different and changing world.

Two quotations may illustrate this point. Specialists in international law state that the European "Traditional international law was based upon a rigid distinction between the state of peace and the state of war. Countries were either in a state of peace or a state of war: there was no intermediate state, although there were cases in which it was difficult to tell whether the transition to a state of war had been made."[225] In 1888, the English jurist and historian Sir Henry Sumner Maine (1822-1888) explicitly states, "It is not peace which was natural and primitive and old, but rather war. War appears to be as old as mankind, but peace is a modern invention."[226] Sir Henry thus reiterates in 1888 Ibn Khaldūn's observation, that throughout history war was considered the normal state of relations with others. Muslim scholars of the second/eighth century who maintained that war was the normal state of relations with others were, therefore, stating a fact[227] about their historical context, not formulating Islamic beliefs. Furthermore, the fact that modern countries, according to traditional international law, used to classify their relations with other countries as either in a state of peace or a state of war means that, until recently, modern countries considered themselves to be in a state of war whenever there was no recognized state of peace with other countries.

Throughout history, many historical divisions of the world have been developed in order to create an "other" or to classify or rank the rest of the human race, or to create a conflict between the good/we and the evil/others, in which the good prevails over the evil. Zoroaster created the formula of the victory of good/light

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[225] Dieter Fleck, ed., *The Handbook of International Humanitarian Law in Armed Conflicts* (Oxford: Oxford University Press, 1995), p. 39.
[226] Henry Sumner Maine, *International Law: A Series Delivered before the University of Cambridge 1887* (London: John Murray, 1888), p. 8.
[227] Esposito, *Unholy War*, p. 29.

over evil/darkness three thousand years ago.[228] In Christianity, Augustine developed a Christian theological division of the world between the *civitas dei* (the city of God) and the *civitas terrenae* (the city "that ordered to the things of the earth"[229]). Concerning the admissibility of the world to the law of nations, James Lorimer writes in 1883 that "As a political phenomenon, humanity, in its present condition, divides itself into three concentric zones or spheres – that of civilised humanity, that of barbarous humanity, and that of savage humanity", respectively entitled to "plenary political recognition, partial political recognition, and natural or mere human recognition."[230] Thus, Lorimer rejects the recognition of Turkey, because "The Turks, as a race, are probably incapable of the political development which would render their adoption of constitutional government possible."[231] Moreover, he claims that "To talk of the recognition of Mahometan [Muslim] States as a question of time, is to talk of nonsense. Unless we are all to become Mahometans, that is a time which Mahometanism itself tells us can never come."[232] Other European jurists such as Thomas Erskine Holland (d. 1926) and William Edward Hall (d. 1894) proposed a division of the world according to "the degrees of civilization, not religion, as a bar to full recognition… until non-European states would become members of the Family of Nations."[233]

Since the Cold War, the world has been divided into numerically descending Worlds, the First World, Second World, Third World and Fourth World (or Least

[228] Shireen T. Hunter, *The Future of Islam and the West: Clash of Civilizations or Peaceful Coexistence?* (Westport. CT: Praeger, 1998), p. 4.
[229] Johnson, *The Holy War Idea*, pp. 48 f.; Johnson, *Morality and Contemporary Warfare*, pp. 16, 168 f., 179 f. See also Muḥammad Saʿīd al-ʿAshmāwī, *Uṣūl al-Sharīʿah*, 4th ed. (Cairo: Madbūlī al-Ṣaghīr, 1996/1416), p. 94.
[230] James Lorimer, *The Institutions of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities* (Edinburgh; London: William Blackwood & Sons, 1883), Vol. I, p. 101.
[231] Ibid., p. 123.
[232] Ibid., pp. 123 f.
[233] Khadduri, *War and Peace*, p. 283.

Developed Countries). After the collapse of the Soviet Union, Huntington divided the world into seven civilizations, Western, Confucian, Japanese, Islamic, Hindu, Slavic-Orthodox and Latin American civilizations, but was unsure of the eighth, i.e., the African civilization.

From Zoroaster's battle between good and evil to Huntington's clash of civilizations, the question that is worth investigating is how far these theories have influenced the attitudes of their proponents towards members of the other civilizations. Although there is a thin line, sometimes invisible, between such theories or even between laws and the actions prompted by them, the fact remains that it is the powers that be which determine what course of action should be taken, according to their different interests. Some of the theories referred to above reflect racist tendencies, political or economic ideologies, or religious or civilizational classifications of all others. These tendencies and classifications depend on the way in which their proponents view their own identity, namely, in terms of religion, race, political or economic ideology, civilization or simply good versus evil. The result is that others who do not share the same identity are alienated, demonized and may even be classed as enemies.

Some of these theories have collapsed because people change the grounds upon which they define their own identities, whether in terms of religion, race or political ideology. But before the collapse of such theories and before they can be judged in a later context, terrible atrocities have been committed in their name by those in power and the masses have also been victimized, at least by believing in, or interpreting incidents according to, such racist or inimical theories. The conclusion here is that such divisions are created by theorists or academics and actions are taken accordingly by politicians; and that those in power sometimes impede the

achievement of justice and, therefore, of world peace and security. Thus world peace will only be achieved when differences in the religious, ethnic, ideological or civilizational affiliations cease to prevent the pursuit of the rule of international law and justice.

The collapse of the former Soviet Union and Communism has created a vacuum in international relations, which prompted Huntington to hypothesise a new paradigm of international relations involving a clash between the Islamic and Western civilizations.[234] Shireen T. Hunter notes, "Bernard Lewis introduced the concept of the clash of civilizations before the final collapse of the Soviet Union, but it did not capture people's imaginations. Samuel Huntington popularized it in 1993."[235] In 1990, Lewis, who introduces himself "as a historian of Islam who is not a Muslim",[236] created this theory by framing the relation between Islam and the West, in an article entitled "The Roots of Muslim Rage", as follows: "This is no less than a *clash of civilizations*- [emphasis added] the perhaps irrational but surely historic reaction of an ancient rival against our Judeo-Christian heritage, our secular present, and the worldwide expansion of both."[237]

One of the dangers inherent in this theory is that it could turn into a "self-fulfilling prophecy".[238] Proponents of hostile relations between the West and Islam

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[234] For an excellent examination of Huntington's thesis see, Pippa Norris and Ronald Inglehart, "Islam and the West: Testing the 'Clash of Civilization' Thesis", *Harvard University, John F. Kennedy School of Government, Faculty Research Working Paper*, No. RW: P02-015, April 2002, available from http://ksgnotes1.harvard.edu/Research/wpaper.nsf; Internet; accessed on 9 June 2007.

[235] Hunter, *The Future of Islam and the West*, p. 5. See also Lamis Andoni, "In the Service of Empire", *Al-Ahram Weekly*, 12-18 December 2002, Issue 616, p. 6; Richard Jackson, "Constructing Enemies: 'Islamic Terrorism' in Political and Academic Discourse", *Government and Opposition*, Vol. 42, No. 3, 2007, p. 399.

[236] Bernard Lewis, "Roots of Muslim Rage", *The Atlantic Monthly*, Vol. 266, No. 3, September 1990, p. 60.

[237] Ibid., pp. 47-60.

[238] See An-Naʿim, "Upholding International Legality", p. 164; Chiara Bottici and Benoît Challand, "Rethinking Political Myth: The Clash of Civilizations as a Self-Fulfilling Prophecy", *European Journal of Social Theory*, Vol. 9, Issue 3, 2006, pp. 315-336; M. Cherif Bassiouni, "Evolving Approaches to Jihad: From Self-Defense to Revolutionary and Regime-Change Political Violence", *Journal of Islamic Law and Culture*, Vol.10, No. 1, April 2008, p. 77; Copinger-Symes, "Is Osama

could simply resort to it to interpret certain acts or to provide justifications for certain others. The theory revives the legacy of an old Western literature that presents a history of rivalry between Christianity and Islam.[239] Huntington states, “Conflict along the fault line between Western and Islamic civilizations has been going on for 1,300 years.”[240] According to this literature, Islam has brought a large part of the Christian world under the influence of Islam, allegedly by force, through what is described as the “instrument” called jihād. Thus, for this literature, jihād is the “instrument” of Islamic international law through which Islam is obliged by the permanent and unchangeable divine laws of Islam, i.e., sharīʿah, to bring the rest of the world into Islam. Apparently following Khadduri’s misunderstanding of the classical Islamic theory of international law, Lewis makes this misleading connection between historical Islamic concepts, but distorts them and contemporary relations between Muslims and the West in the following words: “In the classical Islamic view, *to which many Muslims are beginning to return* [emphasis added], the world and all mankind are divided into two: the House of Islam, where the Muslim law and faith prevails, and the rest known as the House of Unbelief or the House of War, which it is the duty of Muslims ultimately to bring to Islam.”[241]

Thus Lewis presents Islam as inherently, and determined to be, a religion that is violent towards others. Without referring to Lewis, Khaled Abou El Fadl points to

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bin Laden’s ‘*Fatwa* Urging *Jihad* against Americans’ dated 23 February 1998 Justified y Islamic Law?”, p. 214.

[239] See Bernard Lewis, *Islam in History: Ideas, Men and Events in the Middle East* (London: Alcove Press, 1973), pp. 15-19; Bernard Lewis, “Jihad vs. Crusade”, *Wall Street Journal*, New York, Sep. 27, 2001, p. A. 18; Lewis, *The Crisis of Islam*, p. 37; Khadduri, “The Islamic Theory of International Relations and Its Contemporary Relevance”, p. 33; Khadduri, *War and Peace*, pp. 53 f.; H.A.R. Gibb, “Religion and Politics in Christianity and Islam”, in J. Harris Proctor, ed., *Islam and International Relations* (London: Pall Mall Press, 1965), p. 23, Beverley Milton-Edwards, *Islam Politics in the Contemporary World* (Cambridge: Polity, 2004), pp. 155 f.

[240] Samuel P. Huntington, “The Clash of Civilizations?”, *Foreign Affairs*, Summer 1993, Vol. 72, No. 3, p. 31. See also Samuel P. Huntington, *The Clash of Civilization and the Remaking of World Order* (New York: Simon & Schuster, 1996); Samuel P. Huntington, “If Not Civilizations, What? Paradigms of the Post-Cold War World”, *Foreign Affairs*, Fall 1993, Vol. 72, No. 5, pp. 186-194.

[241] Lewis, “Roots of Muslim Rage”, pp. 47-60. See also Khadduri, *The Law of War and Peace*, pp. 19 f.

this presentation of this historical concept: “Many of the books written by non-Muslim scholars in the West perpetuate the myth that Islamic law invariably dictates that the world should be divided into two abodes forever looked in conflict. Often the same books falsely assume that most Muslims today adhere to the same bipolar view of the world.”[242] In an interview about the theory of the “clash of civilizations” and the Western stereotypes of Islam, Edward Said describes this portrayal of the *dār al-Islām* versus *dār al-ḥarb* formula as “largely an invention of orientalists who found it somewhere in the eighth century”.[243]

The theory of the clash of civilizations unjustifiably restricts the “others” of Islam to Western people, and not the rest of the non-Muslims of the world. Lewis creates this formula by creating a “We”, referring to “we of the West”, “Americans”, “Western civilization”, “we…in the free world”, versus “Islam”, the “Muslim world”, “Islamic fundamentalism” and “Muslim fundamentalism”.[244] But Western civilization, according to this theory, is no longer characterized by Christianity, though it has been referred to as a “Judeo-Christian civilization”. The West is characterized now by secularism, liberalism, democracy and human rights.

Akbar S. Ahmed foresaw the current relation between Islam and the West. He emphasises the importance of understanding Islam not “in the traditional manner of the Orientalists”. Otherwise, he anticipates, “Not being able to understand Islam fully and being impatient with it, the West will consider Islam as problematic. It will be seen as the main counterforce to Western civilization. Into the 1990s, an opinion is

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[242] Abou El Fadl, *The Greater Theft*, pp. 230 f. Sohail H. Hashmi also writes here that: “Much of the Western literature on Islam in contemporary international politics begins with the assumption that the Muslim worldview is still shaped by the *dar al-harb*/*dar al-Islam* dichotomy. Such arguments overlook the centuries-long experience of Muslim states; Islamic “customary law” provides numerous examples that Muslim state practice never quite conformed to the legal theory.” See Sohail H. Hashmi, “International Society and its Islamic Malcontents”, *Fletcher Forum of World Affairs*, Vol. 20, 1996, p. 19.
[243] Alexander Cockburn, “What is Islam?”, *New Statesman & Society*, Feb. 10, 1995, 8. 339, p. 20.
[244] Lewis, *The Crisis of Islam*, pp. 27, 26, 25, 164, 25, 27, 28.

already taking shape of Islam as the major enemy after the collapse of communism. There are signs that some of the free-floating hostility directed against communism over the last decade will move toward Islam."[245]

The stereotypical portrayal of the Islamic theory of international law as a doctrine of offensive war, i.e., jihād against the *dār al-ḥarb*, or the so-called infidels, is imported to interpret current events in order to justify holding Islam responsible for the so-called clash with the West's values of democracy and liberalism. Moreover, conflicts, acts of terrorism and suicide bombings are unreasonably linked to the teachings of Islam, particularly jihād, and not to their political root causes (see Chapter Five). Thus it is no wonder that the recommendations of the eighth conference of the SCIA call upon non-Muslim countries to stop spreading hatred towards Islam and Muslims and to present Islamic concepts objectively and accurately. The recommendations also ask the Western media not to judge Islam or Muslims according to the un-Islamic acts of a few individuals.[246] This means that attributing the causes of conflicts and acts of terrorism to the teachings of Islam and particularly jihād, is a serious mistake which in itself could lead to catastrophic consequences, specifically in a world that is becoming increasingly interconnected and interdependent. This may easily endanger the relationship between Islam and the West and particularly the integration of Muslim minorities living in the West.

### 3.6 Conclusion

The Islamic law of war, like the just war theory, has evolved through diverse stages in history and, more importantly, in response to varying political and historical

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[245] Akbar S. Ahmed, "Postmodernist Perceptions of Islam: Observing the Observer", *Asian Survey*, Vol. 31, No. 3, Mar. 1991, pp. 230 f.

[246] See *Islam and the Future Dialogue between Civilizations*, Researches and Facts, the Eighth General Conference of the Supreme Council for Islamic Affairs (Cairo: N.p., 1998/1418), pp. 414 f.

situations. Throughout history, classical and modern Muslim scholars have advocated that it is an obligation on Muslims to resort to war to defend themselves against enemy aggression and invasions. On the basis of the Qur'ānic injunctions,[247] they also advocate that the religious persecution of a Muslim minority, or even non-Muslim minorities, as argued by al-Qaraḍāwī[248] (see Chapter Two), is another justification for war. But concerning the peculiar classical Islamic justification for war, namely, to safeguard the freedom of Muslims particularly to preach the religion of Islam to non-Muslim countries,[249] it can be safely stated here that, at present, preaching Islam via an offensive military campaign has become, for Muslims, inconceivable. In the words of Hashmi, "Most Muslims today disavow the duty to propagate Islam by force and limit jihad to self-defense."[250] Therefore, at present, no matter how contemporary Muslims formulate the Islamic *casus belli*, the overwhelming majority advocate the same *casus belli* as that given by the majority of classical jurists, namely aggression against, or religious persecution of, Muslims. In other words, they advocate jihād as a defensive just war.[251] However, a minority still

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[247] Qur'ān 4:75-76.
[248] Al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, pp. 241 f., 435 f.
[249] See, for example, Maḥmūd Shaltūt, the late Shaykh al-Azhar, in Peters, trans. and ed., *Jihad in Mediaeval and Modern Islam*, pp. 45, 51; Peters, "Djihad", p. 286; Muḥammad Abu Zahrah, *Zahrah al-Tafāsīr* (Cairo: Dār al-Fikr al-ʿArabī, 1987?), Vol. 6, p. 3232; Fayyāḍ, "Al-Siyāsah al-Khārijiyyah lil-Islām", p. 205; ʿĀmir, *Aḥkām al-Asrā*, p. 73; ʿAbd al-ʿAzīz al-Khayyāṭ, "Al-Islām Dīn al-Salām: Mafhūm al-Ḥarb wa al-Salām fī al-Islām", *Islam and the 21st Century*, Researches and Facts, the Tenth General Conference of the Supreme Council for Islamic Affairs (Cairo: Supreme Council for Islamic Affairs, 1999/1420), p. 332; al-Būṭī, *Ḥurriah al-Insān*, pp. 110-112; Safi, *Peace and the Limits of War*, p. 32; Emerick, "What is the Position of Islam on War and Conflict?".
[250] See Hashmi, "Interpreting the Islamic Ethics of War and Peace", p. 214.
[251] See, for example, al-Armanāzī, *Al-Sharʿ al-Dawlī*, pp. 115-117; Abū Zahrah, *Al-ʿAlāqāt al-Dawliyyah fī al-Islām*, p 92; Abū Zahrah, *Zahrah al-Tafāsīr*, Vol. Vol. 1, p. 83, Vol. 3, p. 1566; Mahmassani, *Al-Qānūn wa al-ʿAlāqāt*, pp. 177, 180, 190-196; ʿAbd al-Ḥalīm Maḥmūd, *Al-Jihād fī al-Islām*, 2nd ed. (Cairo: Dār al-Maʿārif, 1988), pp. 5-14, 21; Sābiq, *Fiqh al-Sunnah*, Vol. 3, pp. 16-19; al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, pp. 90-94; al-Zuḥaylī, *Al-ʿAlāqāt al-Dawliyyah*, pp. 25-35, 94-103; Haykal, *Al-Jihād wa al-Qitāl*, Vol. 1, pp. 586-598, 857-859; Fayyāḍ, "Al-Siyāsah al-Khārijiyyah lil-Islām", p. 204, 206; Aḥmad Shalabī, *Al-Jihād wa al-Nuẓum al-ʿAskariyyah*, pp. 58-60; Aḥmad Nār, *Al-Qitāl fī al-Islām*, 2nd ed. (Ḥumṣ: Al-Maktabah al-Islāmiyyah, 1968), pp. 14 f.; Zahrān, *Al-Silm wa al-Ḥarb*, pp. 37 f.; Hārūn Sīngūbā, "Mafhūm al-Ḥarb wa al-Salām fī al-Islām", *Islam and the 21st Century*, Researches and Facts, the Tenth General Conference of the Supreme Council for Islamic Affairs (Cairo: Supreme Council for Islamic Affairs, 1999/1420), pp. 340 f.; Wahbah, *Al-Ḥarb fī al-Islām*, pp. 21 f.; Āl Maḥmūd, *Al-Jihād al-Mashrūʿ*, p. 31; al-Firjānī, *Uṣūl al-ʿAlāqāt*, pp. 87-89; Ṣaqr,

exists which espouses al-Shāfiʿī's understanding of jihād as offensive war against non-Muslims because of their rejection of Islam or refusal to submit to the Islamic state.[252]

The current Western literature on the subject of Islamic international law, and jihād in particular, indicates a huge degree of misunderstanding and contradiction between the Islamic/insider and Western/outsider traditions of scholarship. The most obvious and common error of confusing sharīʿah with *fiqh* has led to the mistake of regarding the jurists' interpretations and judgements as divine, permanent laws of Islam, i.e., sharīʿah. In other words, instead of studying these jurists' rulings as part of the consideration of the history of theories of international law, these rulings are presented as the divine laws of Islam. The jurists' interpretations and formulations of Islamic laws were purely scholarly juridical works, which inevitably resulted in the adoption and introduction of a variety of laws, depending on the exercise of their

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*Falsafah al-Ḥarb*, pp. 83, 100 f., 107; al-Hindī, *Aḥkām al-Ḥarb wa al-Salām*, pp. 154-166; al-Khayyāṭ, "Al-Islām Dīn al-Salām", pp. 331-333; al-Shihābī, *Mafhūm al-Ḥarb*, pp. 49-54; al-Zayd, *Al-Qānūn al-Dawlī al-Insānī*, p. 75; al-Ḥifnī, *Mawsūʿah al-Qur'ān*, Vol. 2, p. 1867; al-Sibāʿī, *Min Rawāʾiʿ Ḥaḍāratinā*, p. 74; Krīmah, *Al-Jihād fī al-Islām*, p. 27, 195-199; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, pp. 267, 423-447; Mahmassani, "The Principles of International Law in the Light of Islamic Doctrine", pp. 221, 279 f., 282-285, 290, 321; Peters, "Djihad", p. 286; Esposito, *Unholy War*, p. 65; Yamani, "Humanitarian International Law in Islam: A General Outlook", p. 190; Alsumaih, "The Sunni Concept of Jihad", pp. 6 f., 266-273, 363; Pirzada "Islam and International Law", p. 203; Masmoudi, "Struggles Behind Words", p. 23; El-Ayouty, "International Terrorism under the Law", p. 489; Ghanbarpour-Dizboni, "Islam and War", p. 14; Malik Abdulazeez al-Mubarak, "Warfare in Early Islam" (PhD thesis, University of Glasgow, 1997), p. 171; Badawi, "Muslim/Non-Muslim Relations", p. 269; Suheil Laher, "Indiscriminate Killing in Light of Islamic Sacred Texts", in Aftab Ahmad Malik, ed., *The State We Are in: Identity, Terror and the Law of Jihad* (Bristol: Amal Press, 2006), pp. 48 f.; Mir, "Islam, Qur'anic", p. 210; Brek Batley, "The Justifications for Jihad, War and Revolution in Islam", Strategic and Defence Studies Centre, The Australian National University, Canberra, Working paper No. 375, June 2003, available form
http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ots591=0C54E3B3-1E9C-BE1E-2C24-A6A8C7060233&lng=en&id=34053; Internet; accessed 19 March 2009, p. 10; Emerick, "What is the Position of Islam on War and Conflict?"; Van Engeland, "The Differences and Similarities between International Humanitarian Law and Islamic Humanitarian Law", pp. 83, 87 f. According to the words of Malekian, "Aggressive war is considered a prohibited act under the concept of Islamic international criminal law. Islamic law contrary to interpretations by Western writers not only does not permit war but also restricts the waging of war in certain inevitable situations in relations between states." Malekian, *The Concept of Islamic International Criminal Law*, p. 49.

[252] See on this minority, al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, pp. 256-391.

judgement and the surrounding historical circumstances.[253] But since these laws are ascribed to a religion, and particularly when they are incorrectly presented as part of the sharīʿah, it has been wrongly assumed that they must form a unified permanent code of laws.

The complexity of the study of the law of war in Islam results from the fact that the sources upon which the law has been formulated, i.e., the incidents of warfare that took place between Muslims and their enemies during the Prophet's lifetime, and the relevant Qur'ān and ḥadīth texts, have been variously interpreted by Muslim historians, exegetes and jurists. The Islamic literature on the subject could therefore be selectively used to advocate any position on the Islamic law of war, or any of the various descriptions of jihād referred to above. But the comparison between the insider and outsider literatures[254] on jihād is striking. The contradictory readings of jihād in these literatures make it possible to label studies in this area as prejudiced, objective or apologetic depending on whether the writer and readers already believe in either of the contradictory readings of jihād, referred to above. Thus, studies presenting jihād as unjust war are labelled as prejudiced by some but objective by others, while studies presenting jihād as just war are labelled objective by one group and apologetic by another. More interestingly, Muslim detractors of jihād and Islam in general are labelled fair-minded according to the first reading, while non-Muslims who present jihād as a just war are labelled fair-minded according to the second.

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[253] Mustansir Mir argues that "The classical doctrine of *jihad* is to be understood in its historical context: it has a 'situational' character and is the product of an 'atomistic' approach." Mustansir Mir, "Jihād in Islam", in Hadia Dajani-Shakeel and Ronald A Messier, eds., *The Jihād and its Times: Dedicated to Andrew Stefan Ehrenkreutz*, Michigan Series on the Middle East, No. 4 (Ann Arbor: University of Michigan, Center for Near Eastern and North African Studies, 1991), p. 115.
[254] On this issue see, Bilal Sambur, "The Insider/Outsider Problem in the Study of Islam", *The Islamic Quarterly*, Vol. XLVI, No. 1 2002, pp. 95-106.

This indicates the importance of judging the Islamic law of war on the basis of how it is presented and advocated in the insider literature. Irrespective of how the historical incidents of warfare waged by Muslims and the Qur'ānic texts on warfare are presented in the outsider literature, it stands to reason that any study of the law of war in Islam must present it as it is advocated by Muslims themselves and then judge it accordingly. It is important and even simply logical to investigate the law of war in Islam as it is advocated by the believers in this tradition, which is what this study has attempted to do. The need to use the insider approach in the study of a religion, or the followers of a religion, is clear: only in this way can the teachings or laws of a religion be judged. More importantly, the followers of a religion should be expected to live up to what they themselves advocate in their religion. Concerning issues about the regulation of international relations, it is becoming increasingly urgent to reach a global ethical framework, particularly as regards war. Indeed, it is also to be highly recommended that a global ethical framework be developed on other issues, but in these other issues the inevitable variety of values based on diverse cultures must be recognized.

It has been noticed that the Islamic ethical contributions to the current system of international relations "are not in proportion to its potential as a source of ethical tradition and as a force that could influence the behaviour of states in the international arena".[255] This is explained by the fact that the current international system is dominated by Western legal systems and ideologies. But this minimal Islamic contribution relates to what Abou El Fadl describes as "the undeniable

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[255] Muhammed Muqtedar Khan, "Islam as an Ethical Tradition of International Relations", in Abdul Aziz Said, Nathan C. Funk and Ayse S. Kadayifci, eds., *Peace and Conflict Resolution in Islam* (Lanham MD: University Press of America, 2001), p. 73. See also Bedjaoui, "The Gulf War of 1980-1988 and the Islamic Conception of International Law", p. 295. For the potential Islamic "role in the preservation of international peace and security" and humanitarian intervention, see Hashmi, "Is There an Islamic Ethic of Humanitarian Intervention?", pp. 55-73.

traumatic experience of colonialism, which dismantled the traditional institutions of civil society."[256] The colonial powers have replaced many areas of Islamic law with Western laws, except in the area of family law.[257] But the stagnation of Islamic jurisprudence dates back to the call to "close the door of ijtihād" at the end of the third/ninth century, which has adversely affected the contribution of Islamic jurisprudence to Islamic civilization.[258]

Moreover, the current autocratic regimes in most Muslim countries have taken control of their religious and scholarly institutions. Unlike the classical jurists, contemporary Muslim religious scholars have become salaried employees of these regimes. The hostile attitudes of secular Muslim nationalist regimes to religion in some Muslim countries, and their control of religious institutions on certain issues, have weakened trust in these institutions. More importantly, this situation has caused Muslim fundamentalists to find their own way into the texts and to apply their understanding of the texts to current situations. It must be concluded that it is not enough for Western scholars alone to avoid the traditional bias in understanding Islam, but, more urgently, Muslim scholars too should present the Islamic positions on issues relevant to the current international situation, particularly the Islamic law of

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[256] Abou El Fadl, "Islam and the Theology of Power", *Middle East Report*, p. 31. See also Bedjaoui, "The Gulf War of 1980-1988 and the Islamic Conception of International Law", p. 295. For the effect of replacing the Islamic laws by Western legal codes by the colonial powers, Kamali conclude that fiqh "as a result lost its originality and contact with social reality and underwent a most tenacious period of stagnation and decline whose negative legacy still remains to be the main challenge and preoccupation of the Muslims of twentieth century." Kamali, "*Fiqh* and Adaptation to Social Reality", p. 68; see also Kamali, "Issues in the Understanding of *Jihād* and *Ijtihād*", p. 626; ʿAbd al-Ḥalīm Maḥmūd, *Al-Jihād fī al-Islām*, pp. 196-173.

[257] See Jackson, "Jihad and the Modern World", p. 4; Kamali, "Issues in the Understanding of *Jihād* and *Ijtihād*", p. 626; Muḥammad, *Al-Fiqh al-Islāmī*, p. 137. In the words of Judge Bedjaoui, "In such circumstances [Muslim and Arab countries under Western colonialism] Muslim jurists could only display their scholarship and experience in the politically innocuous area left to them by their colonial masters or protectors: the private law of persons and property", see Bedjaoui, "The Gulf War of 1980-1988 and the Islamic Conception of International Law", p. 295.

[258] On closing the door of *ijtihād* see, Muḥammad, *Al-Fiqh al-Islāmī*, pp. 39-46; Abdal-Haqq, "Islamic Law", pp. 60-63; Arzt, "Heroes or Heretics", pp. 384-385. For arguing that the door of *ijtihād* was never closed in theory nor in practice see, for example, Hallaq, "Was the Gate of *Ijtihād* Closed?", pp. 3-41; Shalabī, *Al-Fiqh al-Islāmī*, pp. 219 f.; Abdel Haleem, *Understanding the Qur'ān*, p. 60; Reuven Firestone, "Jihād", in Andrew Rippin, ed., *The Blackwell Companion to the Qur'ān* (Oxford: Blackwell, 2006), p. 318; al-Ghunaimi, *Qānūn al-Salām fī al-Islām*, pp. 190 f.

war. The declining role of Islamic jurisprudence is one of the reasons of the deterioration of Islamic civilization and this explains the present weakness of the contribution of Islamic civilization to human civilization.

The understanding of Islam has today become far more critical than Akbar S. Ahmad anticipated in 1991.[259] Understanding Islam and thus knowing how to deal with it has become a matter of strategic security for some Western countries.[260] Western researchers who have started to study the law of war in Islam should therefore start a new line of investigation which directly studies Muslim literature, preferably in its own languages, rather than depending on the notorious orientalist literature and not taking an approach, as Ahmed points out, "in the traditional manner of the Orientalists".[261] At the same time, Muslim scholars should codify[262] an Islamic law of war, applicable in the contemporary world, which could be adopted by Islamic bodies of jurists or scholars. This should include both the Islamic *jus ad bellum* and more urgently, as will be explained in the next chapter, the Islamic *jus in bello* norms in the contexts of modern warfare. Although this codification would not amount to more than a theoretical scholarly contribution to the global discussion of the ethics of war and peace, it is a contribution that should be recognized as an authoritative representation of Islamic law, thus preventing insider or outsider scholarship from being accused of selectively representing certain positions. More importantly, as explained in the following chapters, this could provide religiously sanctioned *jus in bello* norms that could prevent un-Islamic acts on the part of individual Muslims,

[259] Ahmed, "Postmodernist Perceptions of Islam", p. 231.
[260] In what he calls a "deliberate effort to counteract those arguments which focus on Islamic culture as a source of inevitable conflict with the West", Johnson rightly concludes that: "Indeed, the nature of contemporary conflict poses a challenge to develop new and more inclusive ways of thinking about the causes of conflict and of the form conflict may take. Understanding how religion may function within a given culture in relation to conflict *is an important beginning, but only a beginning* [emphasis added]." See Johnson, *Morality and Contemporary Warfare*, pp. 188, 190.
[261] Ahmed, "Postmodernist Perceptions of Islam", p. 231.
[262] On the modern attempts of the codification of the "sharīʿah" in certain Muslim countries see, Mayer, "The Sharīʿah", pp. 177-198.

specifically in cases when the warriors or perpetrators of acts of warfare or terrorism are not in regular state armies. Otherwise, although all Muslim countries are constrained by the dictates of international law, Muslims and non-Muslims will still resort to the use or misuse of their respective understandings of jihād when describing acts of war involving Muslims.

# CHAPTER FOUR

# ISLAMIC INTERNATIONAL HUMANITARIAN LAW

## 4.1 Introduction

Several scholars have pointed out that the classical Muslim jurists paid the greatest part of their attention to the Islamic *jus in bello* (the rules regulating the conduct of war) while paying little attention to the Islamic *jus ad bellum* (the justifications for resorting to war).[1] This observation holds true not only for international wars, the subject of this chapter, but also for domestic or non-international wars,[2] discussed in Chapter Five. Contrary to the classical Muslim jurists, however, modern Muslim writers focus on the Islamic *jus ad bellum* partly because, as Hashmi explains, they have engaged in "responses to Western apprehensions of jihad"[3] while paying no attention to addressing the Islamic *jus in bello*, which can be applied to contemporary war contexts.[4] Ironically, and significantly, however, Western scholars have focused solely on giving various interpretations of the Islamic *jus ad bellum*, but have almost ignored the Islamic *jus in bello*.[5]

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[1] Rudolph Peters, *Jihad in Classical and Modern Islam* (Princeton: Markus Wiener, 1996), p. 119; Khaled Abou El Fadl, "The Rules of Killing at War: An Inquiry into Classical Sources", *The Muslim World*, Vol. LXXXIX, No. 2, April, 1999, p. 150; Khaled Abou El Fadl, "Islam and the Theology of Power", *Middle East Report*, No. 221, Winter 2001, p. 30; Ann Elizabeth Mayer, "War and Peace in the Islamic Tradition and International Law", in John Kelsay and James Turner Johnson, eds., *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions* (Westport, Conn.: Greenwood Press, 1991), p. 197; Sohail H. Hashmi, "Saving and Taking Life in War: Three Modern Muslim Views", *The Muslim World*, Vol. LXXXIX, No. 2, April, 1999, p. 158.

[2] Abou El Fadl, "The Rules of Killing at War", pp. 144 f.

[3] Hashmi, "Saving and Taking Life in War", p. 158.

[4] See T.R. Copinger-Symes, "Is Osama bin Laden's '*Fatwa* Urging *Jihad* against Americans' dated 23 February 1998 Justified y Islamic Law?", in Mashood A. Baderin, ed., *International Law and Islamic Law* (Aldershot: Ashgate, 2008), p. 225.

[5] Shaheen Sardar Ali and Javaid Rehman point to "the fact that Islamic international law and Islamic laws of armed conflict have not received due attention in western legal scholarship." See Shaheen Sardar Ali and Javaid Rehman, "The Concept of Jihad in Islamic International Law", *Journal of Conflict and Security Law*, Winter 2005, Vol. 10, No. 3, p. 322. On the Islamic *jus in bello* in Western literature, see, for example, Abou El Fadl, "The Rules of Killing at War", pp. 144-157; Hashmi, "Saving and Taking Life in War", pp. 158-180; John Kelsay, *Islam and War: A Study in Comparative Ethics* (Louisville, KY: Westminster/John Knox, 1993), pp. 57-76; James Turner Johnson, *The Holy War Idea in Western and Islamic Traditions* (Pennsylvania: Pennsylvania State University Press,

Islamic law, it should be recognized, is a unique legal system, specifically, in the scope of the areas it covers, and in the mechanism and methodologies[6] applied by its jurist-scholars to pronounce on or deduce Islamic law from specific sources. It is also unique in its objectives and enforcement. The objectives are to fulfil the requirements of the divine ordinances, Shariʿah, and to ensure the *maṣlaḥah* (public interest) of the Islamic State. Concerning its enforcement, as explained earlier, with regard to the majority of Islamic law, it is left to the Islamic state or Muslim individuals to choose from the various rulings given by the jurists, who may have belonged to any of several schools of law. Thus, mistaken conclusions will be reached if, in comparative legal studies or in studies by non-Muslims, Islamic law is framed or judged according to the categories of current Western law.

James Cockayne, for example, points out that the Western studies that compare international humanitarian law with Islamic international humanitarian law "tend to exhibit a subtle orientalism, taking the Western system as a yardstick against which the adequacy or compatibility of the oriental Islamic 'other' is measured."[7] This statement indicates the importance of the insider's approach in such comparative studies, simply because each legal system has its particular nature and historical context.

Therefore, this chapter argues that, apart from the unique methodologies by which Muslim jurists deduced the Islamic *jus ad bellum*, the best way to examine the Islamic *jus ad bellum* is through the study of the Islamic *jus in bello*. References will

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1997), pp. 115-127; James Turner Johnson, *Morality and Contemporary Warfare* (New Haven, Conn.: Yale University Press, 1999), pp. 180-186. It is worth adding here that both Kelsay and Johnson's treatments of the Islamic *jus in bello* depend on Khadduri's *War and Peace in the Law of Islam* (Baltimore, MD.: Johns Hopkins University Press, 1955) and his translation of Shaybānī's *Al-Siyar* under the title *The Islamic Law of Nations: Shaybānī's Siyar* (Baltimore, MD.: Johns Hopkins University Press, 1966).

[6] See Yūsuf al-Qaraḍāwī, *Al-Fiqh al-Islāmī bayn al-Aṣālah wa al-Tajdīd*, 2nd ed. (Cairo: Maktabah Wahbah, 1999/1419), pp. 7-12.

[7] James Cockayne, "Islam and International Humanitarian Law: From a Clash to Conversation between Civilizations", *International Review of the Red Cross*, Vol. 84, No. 847, Sep. 2002, p. 597.

be made here to show the prominent areas of agreement and disagreement between Islamic international law and the four Geneva Conventions of 1949, and their Additional Protocols when applicable. The intention here is not to judge Islamic international law according to the Geneva Conventions or vice-versa, but rather first, in the cases when these two agree, to show that Muslims' commitment to the laws that regulate the conduct of war is obligatory on them, not only by virtue of the Islamic principle of *pacta sunt servanda*[8] but also by virtue of the "self-imposed" nature of Islamic law. More importantly, this provides Islamic criteria by which to judge the practice of Muslims during the conduct of hostilities. Second, although Muslims are obliged to abide by the Geneva Conventions and their Additional Protocols, the cases of disagreement between these Conventions and Islamic international law will indicate the need for further efforts, initially, at least, by scholars, to universalize the rules governing the conduct of war.

This chapter therefore examines the *jus in bello* according to Islamic law. Its main aim is to find out what is permissible and what is impermissible in Islamic law concerning the lives and property of enemies during and after the course of the actual conduct of hostilities. A secondary aim is to shed some light on the Islamic laws that

[8] See, for example, Muḥammad Abū Zahrah, *Al-ʿAlāqāt al-Dawliyyah fī al-Islām* (Cairo: Al-Dār al-Qawmiyyah lil-Ṭbāʿah wa al-Nashr, 1964/1384), pp. 41-43; Muḥammad Abū Zahrah, *Tanẓīm al-Islām lil-Mujtamaʿ* (Cairo: Dār al-Fikr al-ʿArabī, n.d.), pp. 41 f.; Nādiyah Ḥusnī Ṣaqr, *Falsafah al-Ḥarb fī al-Islām* (Cairo: Supreme Council for Islamic Affairs, 1990/1410), pp. 111-124; Muḥammad al-Ṣādiq ʿAfīfī, *Al-Mujtamaʿ al-Islāmī wa al-ʿAlāqāt al-Dawliyyah* (Cairo: Mu'assasah al-Khānjī, 1980), pp. 226, 268-274; ʿAbd al-Bāqī Niʿmah ʿAbd Allah, *Al-Qānūn al-Dawlī al-ʿĀmm: Dirāsah Muqāranah bayn al-Sharīʿah al-Islāmiyyah wa al-Qānūn al-Waḍʿī* (Beirut: Dār al-Aḍwā', 1990/1410), p. 43; Joseph Schacht, "Islamic Law in Contemporary States", *American Journal of Comparative Law*, Vol. 8, No. 2, Spring, 1959, p. 139; Hans Wehberg, "Pacta Sunt Servanda", *American Journal of International Law*, Vol. 53, 1959, p. 775; Syed Sharifuddin Pirzada "Islam and International Law", in Altaf Gauhar, ed., *The Challenge of Islam* (London: Islamic Council of Europe, 1978), pp. 210-215; C.G. Weeramantry, *Islamic Jurisprudence: An International Perspective* (Basingstoke: Macmillan, 1988), pp. 132 f., 140 f.; Yassin El-Ayouty, "International Terrorism Under the Law", *ILSA Journal of International & Comparative Law*, Vol. 5, 1999, p. 491; Javaid Rehman, *Islamic State Practices, International Law and the Threat from Terrorism: A Critique of the 'Clash of Civilizations' in the New World Order* (Oxford: Hart Publishing, 2005), p. 46; Emilia Justyna Powell and Sara McLaughlin "The International Court of Justice and the World's Three Legal Systems", *The Journal of Politics*, Vol. 69, No. 2, May 2007, p. 400 f.

regulate relations between non-Muslim citizens of the *dār al-ḥarb* inside the *dār al-Islām* while a state of war exists, though not necessarily during the course of fighting. This will also provide some insights into the Islamic *jus ad bellum*. Fulfilling these two aims will, it is hoped, explain the position of Islamic law on terrorism, discussed in the next chapter.

Islamic international law and the law of war are widely referred to in Western literature as *siyar*. Although the jurists have discussed this area under different titles, such as *jihād*, *siyar*, *maghāzī* (campaigns), *amān* (safe conduct), *qismah al-ghanīmah* (division of the spoils), *hudnah* (truce) and *jizyah* (tax levied to exempt eligible males from conscription), the term *siyar* is widely used in Western sources to refer to this area, simply because it has become common usage. But the meaning of the word *siyar* as it is used by the jurists here to refer to this area gives some insights into the nature of Islamic international law and its objectives.

The word *siyar*, singular *sīrah*, is derived from the verb *sāra* (past), *yasīr* (present), which means to walk, follow or adopt. The noun *sīrah* means the manner, the method, the way followed or the tradition.[9] In Islamic parlance, this term is used to refer to the biography of the Prophet. The plural form of the word, *siyar*, is used in two different literary genres: historical and legal. In the biography (*sīrah*) of the

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[9] See, for example, ʿAlā al-Dīn al-Kāsānī, *Badā'iʿ al-Ṣanā'iʿ fī Tartīb al-Sharā'iʿ*, 2nd ed. (Beirut: Dār al-Kitāb al-ʿArabī, 1982), Vol. 7, p. 97; Zayd al-Dīn ibn Najīm, *Al-Baḥr al-Rā'iq Sharḥ Kanz al-Daqā'iq*, 2nd ed. (Beirut: Dār al-Maʿrifah, n.d.), Vol. 5, p. 76; ʿAbd Allah ibn Maḥmūd ibn Mawdūd, *Al-Ikhtiyār li-Taʿlīl al-Mukhtār*, ed. ʿAbd al-Laṭīf Muḥammad ʿAbd al-Raḥman, 3rd ed. (Beirut: Dār al-Kutub al-ʿIlmiyyah, 2005/1426), Vol. 4, p. 124; Muḥammad Amīn ibn ʿUmar ibn ʿĀbidīn, *Ḥāshiyah Radd al-Muḥtār ʿalā al-Durr al-Mukhtār: Sharḥ Tanwīr al-Abṣār Fiqh Abū Ḥanīfah* (Beirut: Dār al-Fikr, 2000/1421), Vol. 4, p. 119; Edward William Lane, *An Arabic-English Lexicon* (Beirut: Librairie Du Liban, 1968), Vol. 4, pp. 1483 f.; Anke Iman Bouzentia, "The *Siyar*-An Islamic Law of Nations?", *Asian Journal of Social Sciences*, Vol. 35, 2007, pp. 20-26; Aḥmad ibn Muḥammad ibn ʿAlī al-Fayyūmī, *Al-Miṣbāḥ al-Munīr fī Gharīb al-Sharḥ al-Kabīr li-al-Rāfiʿī* (Beirut: Al-Maktabah al-ʿIlmiyyah, n.d.), Vol. 1, p. 299; Muḥammad ibn Makram ibn Manẓūr, *Lisān al-ʿArab* (Beirut: Dār Ṣādir, n.d.), Vol. 4, p. 389 f.; Muḥyī al-Dīn ibn Sharaf al-Nawawī, *Al-Majmūʿ: Sharḥ al-Muhadhdhab*, ed. Maḥmūd Maṭrajī (Beirut: Dār al-Fikr, 2000), Vol. 21, pp. 3 f.; Muḥammad ibn Abī Bakr ibn ʿAbd al-Qādir al-Rāzī, *Mukhtār al-Ṣiḥāḥ*, ed. Maḥmūd Khāṭr (Beirut: Maktabah Lubnān, 1995/1415), p. 136; Aḥmad Maḥmūd Krīmah, *Al-Jihād fī al-Islām: Dirāsah Fiqhiyyah Muqāranah* (Cairo: Al-Dār al-Handasiyyah, 2003/1424), pp. 114 f.

Prophet, the plural *siyar* is used to refer to the military expeditions and missionary journeys arranged by the Prophet in which he did not participate (see Chapter One). In legal texts, *siyar* refers to the areas of Islamic international law and Islamic international humanitarian law that is to the ways and methods followed by the Prophet in his dealings with non-Muslim states and individuals in times of peace and war. The objective of the jurists was to regulate the conduct of the Islamic state and the Muslim individuals vis-à-vis non-Muslim states and their citizens, in accordance with the Qur'ānic ordinances and the precedents set by the Prophet. Furthermore, according to al-Sarakhsī, *siyar* also regulate the conduct of the Islamic state in its internal conflicts with apostates and rebels.[10]

In the process of formulating Islamic international law, the jurists resorted, first, to the Qur'ān and, second, to the traditions of the Prophet and in some cases to the practices of the Prophet's Companions, since they had the best understanding of the Qur'ān and the Prophet's tradition. In formulating the laws according to these sources, the jurists were not primarily concerned with justifying the adoption of such laws. The mere fact that the Qur'ān sets a rule, or that the Prophet acted in a specific way, makes it a binding law. But it stands to reason that the Qur'ān gives different rulings in different situations and that the Prophet acted in different ways or gave different instructions in different contexts. These specific instances gave rise to disagreements among the jurists in their interpretations of these incidents and, therefore, in the laws they advocated in consequence.

In this area of disagreement, i.e., the process of formulating Islamic international humanitarian law, the majority of jurists weighed these texts and precedents against the sanctity of the life and property of the enemy, on the one hand,

[10] Muḥammad ibn Aḥmad ibn Abī Sahl al-Sarakhsī, *Kitāb al-Mabsūt* (Beirut: Dār al-Maʿrifah, n.d.), Vol. 10, p. 2.

and the military necessity of winning the war, on the other. Thus, Roger C. Algase maintains that the Islamic law of war "strikes a balance between military necessity and respect for human life in a manner which gives a higher priority to saving the lives of non-combatants than does modern international law."[11] A minority of jurists selected a law from the Qur'ānic rulings or the Prophet's precedents by applying the principle of abrogation, arguing that any Qur'ānic text, or precedent set by the Prophet, abrogated previous one/s. The formulation of such different laws makes it difficult for researchers to present a balanced discussion of these different laws. Furthermore, this creates the risk of labelling such studies as either apologetic, mainly referring to those who selectively present Islamic international humanitarian law as superior to international humanitarian law and the Geneva Conventions, or prejudiced, mainly referring to those who selectively present a hostile image of Islam.

Significantly, the objective of Islamic international law and Islamic international humanitarian law proves to be in stark contradiction to the genesis of the Christian just war theory, international law and the Geneva Conventions. While the area of Islamic international law and Islamic international humanitarian law started as a law imposed by Muslims upon themselves, irrespective of the behaviour of their enemies,[12] the just war theory started as an attempt to limit the atrocities of war, but only between Christian countries. According to James Turner Johnson, "the medieval church's three major efforts to restrain war in Europe were not understood

[11] Roger C. Algase, "Protection of Civilian Lives in Warfare: A Comparison between Islamic Law and Modern International Law Concerning the Conduct of Hostilities", *Revue de Droit Pénal Militaire et de Droit de la Guerre*, Vol. 16, 1977, p. 248.

[12] See, for example, Khadduri, *The Islamic Law of Nations*, p. 41; Saleem Marsoof "Islam and International Humanitarian Law", *Sri Lanka Journal of International Law*, Vol. 15, 2003, p. 23; Jamāl al-Dīn Maḥmūd, "Al-Jihād wa Akhlāqiyyāt al-Ḥarb fī al-Islām", *Tolerance in the Islamic Civilization*, Researches and Facts, the Sixteenth General Conference of the Supreme Council for Islamic Affairs (Cairo: Supreme Council for Islamic Affairs, 2004/1425), p. 860; Troy S. Thomas, "Jihad's Captives: Prisoners of War in Islam", *U.S. Air Force Academy Journal of Legal Studies*, Vol. 12, 2003, p. 98; P.J. Stewart, *Unfolding Islam*, 2nd ed. (Reading, Berkshire: Garnet Publishing, 2008), p. 79.

to apply to the church's own just wars, the Crusades."[13] As far as international law is concerned, it emerged as a system of law which aimed at regulating relations between only the Christian countries of Europe.[14] Thus, Marcel A. Boisard says that "the founders of international law in Europe excluded the Muslim 'infidels' from the benefits of the law of war."[15] Even the Geneva Conventions are treaties concluded between UN member states and give the contracting parties "the liberty to denounce" these Conventions.[16] This is to conclude that, because of its "self-imposed" nature, Islamic laws may have had the strongest possible influence on the Muslims during the conduct of war and may still have it.

The classical Muslim jurists' efforts to regulate the conduct of Muslims in international war contexts focused mainly on eight major issues, which are the subject of discussion in this chapter. The other issue that attracted much of the jurists' efforts is the division of the spoils of war. Although these eight issues address extremely different war contexts from those of war in the modern world, they primarily satisfy the concerns of the *jus in bello* in any war context. The importance of discussing these eight specific issues is that they are relevant to contemporary issues of world security. The classical jurists' discussions of them convey the position of Islamic law on contemporary issues in which some Muslims are involved, such as targeting non-combatants, let alone kidnapping journalists and humanitarian aid workers in specific Muslim countries, beheadings and acts of terrorism such as blowing up airplanes, trains and buses. These eight issues are as follows:

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[13] Johnson, *The Holy War Idea*, p. 109.

[14] See, for example, Seif Ahmed El-Wady Romahi, *Studies in International Law and Diplomatic Practice: With Introduction to Islamic Law* (Tokyo: Data Labo Inc., 1980), p. 76; Sāmī al-Ṣaqqār, "Niẓām al-Amān fī al-Sharīʿah al-Islāmiyyah wa Āwḍāʿ al-Musta'minīn", in Fārūq Ḥamādah, ed., *Al-Tashrīʿ al-Dawlī fī al-Islām*, Nadawāt wa Munāẓarāt, No. 70 (Rabat: Kulliyyah al-Ādāb wa al-ʿUlūm al-Insāniyyah, 1997), p. 69.

[15] Marcel A. Boisard, *Jihad: A Commitment to Universal Peace* (Indianapolis, Ind.: American Trust Publications, 1988), p. 30. See also Cockayne, "Islam and International Humanitarian Law", p. 603; Weeramantry, *Islamic Jurisprudence*, p. 130.

[16] See Algase, "Protection of Civilian Lives in Warfare", pp. 249 f.

### 4.2 Non-Combatant Immunity

Several ḥadīths are attributed to the Prophet in which he prohibits targeting five specific categories of enemy non-combatants, namely, women, children, the aged, the clergy and *al-ʿAsīf* (any hired man).[17] On the basis of these commands, the jurists developed lengthy discussions on who is and who is not a permissible target in war. They developed a distinction between two categories of the enemy: *al-muqātilah*/*ahl al-qitāl*/*al-muḥāribah* (combatants, fighters/warriors) and *ghayr al-muqātilah*/*ghayr al-muḥāribah* (non-combatants, non-fighters/non-warriors).[18] The term *muqātilah* comes from the verb *yuqātil* (to combat, to fight). The term *muḥāribah* comes from the verb *yuḥārib* (to fight in war). It is worth adding here that the use of the term *muqātilah* to distinguish combatants from non-combatants dates back to the time of Prophet.[19]

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[17] See ḥadīths numbers 17932, 17933, 17934, 17935, 17936 and 17937 in Aḥmad ibn al-Ḥusayn ibn ʿAlī ibn Mūsā al-Bayhaqī, *Sunan al-Bayhaqī al-Kubrā*, ed. Muḥammad ʿAbd al-Qādir ʿAṭā (Mecca: Maktabah Dār al-Bāz, 1994/1414), Vol. 9, pp. 90 f.; ḥadīths numbers 2613 and 2614 in Sulaymān ibn al-Ashʿath Abū Dāwūd, *Sunan Abī Dāwūd*, ed. Muḥammad Muḥyī al-Dīn ʿAbd al-Ḥamīd (N.p.: Dār al-Fikr, n.d.), Vol. 3, p. 37; ḥadīths numbers 2841 and 2842 in Muḥammad ibn Yazīd ibn Mājah, *Sunan Ibn Mājah*, ed. Muḥammad Fū'ād ʿAbd al-Bāqī (Beirut: Dār al-Fikr, n.d.), Vol. 2, pp. 947 f.; ḥadīths numbers 8625, 8626 and 8627 in Aḥmad ibn Shuʿayb al-Nasā'ī, *Sunan al-Nasā'ī al-Kubrā*, ed. ʿAbd al-Ghaffār Sulaymān al-Bindarī and Sayyid Kasrawī Ḥasan (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1991/1411), Vol. 5, pp. 186 f.; ḥadīths numbers 9379, 9382 and 9384 in ʿAbd al-Rāziq ibn Hammām al-Ṣanaʿānī, *Al-Muṣannaf*, ed. Ḥabīb al-Raḥman al-Aʿẓamī, 2nd ed. (Beirut: Al-Maktab al-Islāmī, 1982-3/1403), Vol. 5, pp. 200-202.

[18] See, for example, ʿAlā' al-Dīn al-Samarqandī, *Tuḥfah al-Fuqahā'* (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1984/1405), Vol. 3, pp. 295, 301. Al-Zuḥaylī defines a combatant as "anyone who is engaged directly or indirectly in the fighting such as enlisted or voluntary soldiers whether in the sea, land or air." See Wahbah al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām: Dirāsah Muqāranah*, 3rd ed. (Damascus: Dār al-Fikr, 1998/1419), p. 503; al-Mawdūdī defined combatants as "those who are actively engaged in the fighting." See Abū al-Aʿlā al-Mawdūdī, *Sharīʿah al-Islām fī al-Jihād wa al-ʿAlāqāt al-Dawliyyah*, trans. Samīr ʿAbd al-Ḥamīd Ibrāhīm (Cairo: Dār al-Ṣaḥwah, 1985/1406), p. 171. However, Ḥammīdullāh defines combatants, according to Islamic law, as "those who are physically capable of fighting", see Muḥammad Ḥammīdullāh, *Muslim Conduct of State: Being a Treatise on Siyar, That is Islamic Notion of Public International Law, Consisting of the Laws of Peace, War and Neutrality, Together with Precedents from Orthodox Practice and Preceded by a Historical and General Introduction*, rev. & enl. 5th ed. (Lahore: Sh. Muhammad Ashraf, 1968), p. 59.

[19] When Saʿd ibn Muʿādh was called on to arbitrate in the case of Banū Qurayẓah in the battle of the Ditch, he decreed that all *al-Muqātilah* (all the men who were able to fight) should be executed. See, for example, Muḥammad ibn Muslim ibn ʿUbayd Allah ibn Shihāb al-Zuhrī, *Al-Maghāzī al-Nabawiyyah*, ed. Suhayl Zakkār (Damascus: Dār al-Fikr, 1981/1401), p. 82; Mahdī Rizq Allah Aḥmad, *Al-Sīrah al-Nabawiyyah fī Ḍaw' al-Maṣādir al-Aṣliyyah: Dirāsah Taḥlīliyyah* (Riyadh: Markaz al-Malik Faīṣal lil-Biḥūth wa al-Dirāsat al-Islāmiyyah, 1992/1412), p. 460; ʿAbd al-Ḥamīd

However, the jurists disagreed on who qualifies as a legitimate target in war as a corollary of their disagreement on determining the Islamic *casus belli*.[20] Therefore, the minority position maintained by al-Shāfiʿī (d. 204/820) and Ibn Ḥazm (d. 456/1064), who advocated that the Islamic *casus belli* is the unbelief of the Muslims' enemies, is that, apart from women and children, anyone who refuses to pay *jizyah* is a legitimate target in war. Shāfiʿī adds that it is also impermissible to target all the clergy who confine themselves to worship and are not involved in acts of hostility. Ibn Ḥazm does not accept the authenticity of all the ḥadīths that extend non-combatant immunity beyond women and children.[21] It is worth adding here that jurists disliked targeting relatives of fighting men during combat because the Prophet had prohibited Abū Bakr from targeting his son during the fight.[22]

As for the majority of jurists, who hold that the Islamic *casus belli* is the aggression of the enemy and not his unbelief per se, they extended the list of the five categories of non-combatants specifically declared by the Prophet to be immune from being targeted in war by applying the juristic methodology of analogy to include other kinds of non-combatants. Again, the jurists did not direct much attention to justifying the Islamic prohibition of targeting such specific categories of people during acts of hostility, but rather focused on enumerating the categories of the enemy and distinguishing those who qualified as a legitimate target for fighting from those who did not. They were concerned, however, with presenting the Islamic

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Shākir, *Ghazawāt al-Rasūl* (Tripoli, Lebanon: Jarrūs Press, 1996/1416), p. 81; Muḥammad ʿIzzat Darwazah, *Al-Jihād fī Sabīl Allah fī al-Qur'ān wa al-Ḥadīth*, 2nd ed. (Beirut: Al-Nāshir, 1990), p. 7.

[20] See Muḥammad ibn Aḥmad ibn Muḥammad ibn Rushd, *Bidāyah al-Mujtahid wa Nihāyah al-Muqtaṣid* (Beirut: Dār al-Fikr, n.d.), Vol. 1, p. 281.

[21] ʿAlī ibn Aḥmad ibn Saʿīd ibn Ḥazm, *Al-Muḥallā* (Beirut: Dār al-Āfāq al-Jadīdah, n.d.), Vol. 7, pp. 297-299.

[22] See, for example, Muḥammad al-Ghazālī, *Al-Wajīz fī Fiqh al-Imām al-Shāfiʿī*, ed. ʿAlī Muʿawwaḍ and ʿĀdil ʿAbd al-Mawjūd (Beirut: Dār al-Arqam ibn Abī al-Arqam, 1997/1418), Vol. 2, p. 190; Sobhi Mahmassani, "The Principles of International Law in the Light of Islamic Doctrine", *Recueil des Cours*, Vol. 117, 1966, p. 303; al-Nawawī, *Al-Majmūʿ*, Vol. 21, p. 54; ʿAlī Muḥyī al-Dīn al-Qarah Dāghī, "Al-Usus wa al-Mabādi' al-Islāmiyyah lil-ʿAlāqāt al-Dawliyyah", *Scientific Review of the European Council for Fatwa and Research*, May 2007, Issues 10-11, Part 1, p. 183.

bases, namely, the Qur'ān, ḥadīth, etc., upon which they built their rulings, i.e., who is a legitimate target and who is not. These categories can be described as follows:

### 4.2.1 Women and Children

Muslim jurists unanimously agree that it is impermissible to target women and children in war.[23] Jurists often refer to women and children as one category and thus tend to treat them as one. However, they focus more on women because they seem to expect much less danger from children. Jurists also prohibit targeting a *khunthā* (a hermaphrodite; this term is used in Islamic parlance to refer to a person who looks

[23] See, for example, Muḥammad ibn Idrīs al-Shāfiʿī, *Al-Umm*, 2nd ed. (Beirut: Dār al-Maʿrifah, [1973]/1393), Vol. 4, p. 240; Muḥammad ibn al-Ḥasan al-Shaybānī, *Al-Siyar al-Kabīr*, ed. Ṣalāḥ al-Dīn al-Munjid (Cairo: Maʿhad al-Makhṭūṭāt, n.d.), Vol. 4, p. 1415; Muḥammad ibn al-Ḥasan al-Shaybānī, *Al-Siyar*, ed. Majid Khadduri (Beirut: Al-Dār al-Muttaḥidah, 1975), p. 249; Mālik ibn Anas, *Al-Mudawwanah al-Kubrā* (Beirut: Dār Ṣādir, n.d.), Vol. 3, pp. 6 f.; Aḥmad ibn Idrīs al-Qarāfī, *Al-Dhakhīrah*, ed. Muḥammad Būkhubzah (Beirut: Dār al-Gharb al-Islāmī, 1994), Vol. 3, pp. 397-401; Muḥammad al-Ghazālī, *Al-Waṣīt fī al-Madhhab*, ed. Aḥmad Maḥmūd Ibrāhīm and Muḥammad Muḥammad Tāmir (Cairo: Dār al-Salām, 1997/1417), Vol. 7, p. 19; Ibrāhīm ibn ʿAlī ibn Yūsuf al-Shirāzī, *Al-Muhadhdhab: fī Fiqh al-Imām al-Shāfiʿī*, ed. Zakariyyā ʿImīrat (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1995/1416) Vol. 3, p. 277; Yūsuf ibn ʿAbd al-Barr, *Al-Kāfī fī Fiqh Ahl al-Madīnah* (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1986-7/1407), p. 208; Ibn Ḥazm, *Al-Muḥallā*, Vol. 7, p. 296; Muḥammad ibn ʿAlī ibn Muḥammad al-Shawkānī, *Nayl al-Awṭār: Min Aḥādīth Sayyid al-Khyār Sharḥ Muntaqā al-Akhbār* (Beirut: Dār al-Jīl, 1973), Vol. 8, p. 73; Aḥmad ibn ʿAbd al-Ḥalīm ibn Taymiyyah, *Al-Siyāsah al-Sharʿiyyah fī Iṣlāḥ al-Rāʿī wa al-Raʿiyyah* (N.p.: Dār al-Maʿrifah, n.d.), p. 104; ʿAlī ibn Muḥammad ibn Ḥabīb al-Māwardī, *Kitāb al-Aḥkām al-Sulṭāniyyah wa al-Wilāyāt al-Dīniyyah*, ed. Aḥmad Mubārak al-Baghdādī (Kuwait: Maktabah Dār ibn Qutaybah, 1989/1409), p. 57; Muwaffaq al-Dīn ʿAbd Allah ibn Aḥmad ibn Qudāmah, *Al-Kāfī fī Fiqh al-Imām Aḥmad Ibn Ḥanbal*, ed. Muḥammad Fāris and Musʿad ʿAbd al-Ḥamīd al-Saʿdanī (Beirut: Dār al-Kutub al-ʿIlmiyyah, 2004), Vol. 4, p. 125; Muwaffaq al-Dīn ʿAbd Allah ibn Aḥmad ibn Qudāmah, *Al-Mughnī: fī Fiqh al-Imām Aḥmad Ibn Ḥanbal al-Shaybānī* (Beirut: Dār al-Fikr, 1984-5/1405), Vol. 9, p. 250; Ibn Rushd, *Bidāyah al-Mujtahid*, Vol. 1, p. 280; Aḥmad ibn Ghunaym ibn Sālim al-Nafarāwī, *Al-Fawākih al-Dawānī ʿalā Risālah Ibn Abī Zayd al-Qayrawānī* (Beirut: Dār al-Fikr, 1994-5/1415), Vol. 1, p. 399; al-Shaykh Niẓām, and a group of Indian scholars, *Al-Fatāwā al-Hindiyyah: Fī Madhhab al-Imām al-Aʿẓam Abī Ḥanīfah al-Nuʿmān* (N.p.: Dār al-Fikr, 1991/1411), Vol. 2, p. 194; Muṣṭafā al-Suyūṭī al-Rahaybānī, *Maṭālib ʾUlī al-Nuhā fī Sharḥ Ghāyah al-Muntahā* (Damascus: Al-Maktab al-Islāmī, 1961), Vol. 2, p. 517; Iḥsān al-Hindī, *Aḥkām al-Ḥarb wa al-Salām fī Dawlah al-Islām* (Damascus: Dār al-Numayr, 1993/1413), pp. 167 f.; ʿĀrif Khalīl Abū ʿĪd, *Al-ʿAlāqāt al-Dawliyyah fī al-Fiqh al-Islāmī* (Amman: Dār al-Nafāʾis, 2007), pp. 167-169; Muḥammad Sayyid Ṭanṭāwī, "Al-Ḥukm al-Sharʿī fī Aḥdāth al-Khalīj", *The Islamic Fiqh Council Journal*, Issue No. 5, [1991/1411], p. 59; Abdulrahman Muhammad Alsumaih, "The Sunni Concept of Jihad in Classical Fiqh and Modern Islamic Thought" (PhD thesis, University of Newcastle Upon Tyne, 1998), pp. 117 f.; Sohail H. Hashmi, "Islam, Sunni", *Encyclopedia of Religion and War*, ed., Gabriel Palmer-Fernandez (New York: Routledge, 2004), p. 219; John Kelsay, "Islamic Law of War", *Encyclopedia of Religion and War*, ed., Gabriel Palmer-Fernandez (New York: Routledge, 2004), p. 224.

both male and female) lest this person be a woman.[24] The jurists classified anyone who had not reached puberty or was under the age of fifteen as a child and thus the beneficiary of non-combatant immunity.[25] The same age limit is a prerequisite for Muslims to join a Muslim army.[26] Interestingly, this is the age limit which is also given for the protection of children in the Additional Protocol I, 8 June 1977, of the Geneva Conventions.[27] The jurists deduced this age limit from some ḥadīths which show that the Prophet refused to accept some Muslim male volunteers who were aged fourteen at the battles of Badr (Ramaḍān 2/March 624) and Uḥud (Shawwāl 3/March 625) and accepted them only when they reached the age of fifteen.[28]

Two justifications are briefly given by the jurists for the prohibition of targeting women and children. First, because women and children, according to al-Ghazālī's words, "*laysūā ahl al-qitāl*"[29] (are not fit for fighting). Ibn Qudāmah phrases his justification slightly differently. He states that the reason for a woman's immunity is that "*annahā lā tuqātil*"[30] (she does not fight). While the first phrase may indicate that the justification is women's physical inability to fight, the second indicates that the justification is that normally women do not engage in acts of hostility. Al-Shawkānī (d. 1250-1834) plainly phrases the impermissibility of

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[24] See Manṣūr ibn Yūnus ibn Idrīs al-Buhūtī, *Kashshāf al-Qināʿ ʿan Matn al-Iqnāʿ*, ed. Hilāl Miṣīlḥī Muṣṭafā Hilāl (Beirut: Dār al-Fikr, 1981-2/1402), Vol. 3, p. 50; al-Nawawī, *Al-Majmūʿ*, Vol. 21, p. 54; al-Shirāzī, *Al-Muhadhdhab*, Vol. 3, p. 277; Ibn Qudāmah, *Al-Kāfī*, Vol. 4, p. 125.

[25] Ibn Qudāmah, *Al-Mughnī*, Vol. 9, pp. 248 f.; ʿUmar ibn al-Ḥusayn al-Khiraqī¸ *Mukhtaṣar al-Khiraqī min Masāʾil al-Imām Aḥmad Ibn Ḥanbal*, ed. Zuhayr al-Shāwīsh, 3rd ed. (Beirut: Al-Maktab al-Islāmī, 1982-3/1403), p. 132; Sobhi Mahmassani, *Al-Qānūn wa al-ʿAlāqāt al-Dawliyyah fī al-Islām* (Beirut: Dār al-ʿIlm lil-Malāyīn, 1972/1392), p. 239.

[26] Maryam Elahi concludes that "the use of [Muslim] children in armed conflicts is in direct contravention of the fundamental sources of Islamic law." Maryam Elahi, "The Rights of the Child Under Islamic Law: Prohibition of the Child Soldier", *Columbia Human Rights Law Review*, Vol. 19, No. 2, 1988, pp. 265, 274, 279.

[27] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 77, available from http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079; Internet; accessed 31 August 2009.

[28] Al-Nawawī, *Al-Majmūʿ*, Vol. 21, pp. 20 f.

[29] Al-Ghazālī, *Al-Waṣīt*, Vol. 7, p. 19.

[30] Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 250.

targeting women by "*liḍaʿfihin*" (because of their physical weakness).[31] In support of his justification that fighting is permitted only against enemy combatants, al-Shaybānī (d. 189/804-5) quotes the Qur'ānic *locutionary act* "And fight in the way of God those who fight against you" (Qur'ān 2:190).[32]

Second, other jurists justify the immunity granted to women and children by the principle of *maṣlaḥah*, since they can be enslaved or exchanged for Muslim prisoners of war or for ransom. Despite the different moral grounds upon which these two justifications are based, interestingly, al-Ghazālī gives these two justifications in the same sentence without any elaboration.[33] It can be concluded from this example that, in conformity with the nature of Islamic jurisprudence, the jurists were mainly concerned with giving Islamic rulings in order to regulate the conduct of Muslims, rather than explaining the moral or the philosophical rationale of these laws.

Jurists also unanimously agree that women and children forfeit the right to non-combatant immunity if they play a part in the actual fighting. Nevertheless, they differed on the cases which may justify targeting women and children if they engage in war operations. Unlike ʿAbd al-Raḥman Awzāʿī (d. 157/774), the Mālikī jurists, including Ibn Saḥnūn and ibn Ḥajar, maintain that if a woman stands guard over the enemy's army or strongholds, or if she warns the enemy or throws stones at the Muslim army, she still cannot be targeted.[34] Nonetheless, the Mālikī jurist al-Qarāfī (d. 684/1285) adds that if a woman kills a member of the Muslim army with the stones she has thrown, then she is to be killed.[35] Furthermore, al-Shaybānī advocates that if a woman attacks a man, it is permissible for him to kill her, but only in this

[31] Al-Shawkānī, *Nayl al-Awṭār*, Vol. 8, p. 73. See Mahmassani, *Al-Qānūn wa al-ʿAlāqāt*, p. 239.
[32] Al-Shaybānī, *Al-Siyar al-Kabyr*, Vol. 4, p. 1415.
[33] Al-Ghazālī, *Al-Waṣīt*, Vol. 7, p. 19.
[34] Aḥmad al-Dardīr, *Al-Sharḥ al-Kabīr*, ed. Muḥammad ʿAllīsh (Beirut: Dār al-Fikr, n.d.), Vol. 2, 176; Karima Bennoune, "As-Salāmū ʿAlaykum? Humanitarian Law in Islamic Jurisprudence", *Michigan Journal of International Law*, Vol. 15, Winter 1994, p. 630.
[35] Al-Qarāfī, *Al-Dhakhīrah*, Vol. 3, p. 399.

situation of self-defence. If he manages to capture her, it is impermissible to kill her afterwards.[36] Although Sufyān al-Thawrī (d. 161/778) agrees that a woman can be targeted in the war if she fights, he maintains that it is undesirable to target children, even those who fight.[37] Some jurists maintain that if a woman is the queen, or a child is the king, of the enemy, then either can be killed if they come to the battlefield in order to disperse the enemy.[38] Moreover, according to *Al-Fatāwā al-Hindiyyah*, if a wealthy woman spends a good deal of her money on inciting the enemy to fight, then she can be killed.[39] It should be added here that what the jurists meant by the phrase "can be killed" is that such a person can be the target of fighting during the war operations.

Therefore, most of the jurists prohibit the targeting of women and children in war because they are not combatants, though a few jurists still seem to conceive the prohibition of targeting women and children solely on the basis of the Prophet's command, without being concerned over the wisdom of this prohibition. Most of the jurists deduce the wisdom of this prohibition from the incident when a woman was killed during the battle of Ḥunayn (8/630). When the Prophet found a woman killed in the battlefield, he stated "*mā kānat hadhih tuqātil*" (she was not the one who would have fought). When the Prophet questioned the man who killed her, the man replied that he had killed her because she tried to snatch his sword in order to kill him.[40] On the basis of this report, most of the jurists extended the conception of non-

[36] Al-Shaybānī, *Al-Siyar al-Kabīr*, Vol. 4, p. 1416.
[37] Muḥammad ibn Jarīr al-Ṭabarī, *Kitāb al-Jihād wa Kitāb al-Jizyah wa Aḥkām al-Muḥāribīn min Kitāb Ikhtilāf al-Fuqahā' li-Abī Jaʿfar Muḥammad Ibn Jarīr al-Ṭabarī*, ed. Joseph Schacht (Leiden: Brill, 1933), p. 9.
[38] Al-Samarqandī, *Tuḥfah al-Fuqahā'*, Vol. 3, p. 295; ʿAbd al-ʿAzīz Ṣaqr, *'Al-ʿAlāqāt al-Dawliyyah fī al-Islām Waqt al-Ḥarb: Dirāsah lil-Qawāʿid al-Munaẓẓimah li-Sayr al-Qitāl*, Mashrūʿ al-ʿAlāqāt al-Dawliyyah fī al-Islām 6 (Cairo: Al-Maʿhad al-ʿĀlamī lil-Fikr al-Islāmī, 1996), pp. 46-48; al-Shaykh Niẓām, *Al-Fatāwā al-Hindiyyah*, Vol. 2, p. 194.
[39] Al-Shaykh Niẓām, *Al-Fatāwā al-Hindiyyah*, Vol. 2, p. 194.
[40] See, for example, ḥadīth 9383 in al-Ṣanaʿānī, *Al-Muṣannaf*, Vol. 5, p. 201; ʿAbd al-Munʿim al-Ḥifnī, *Mawsūʿah al-Qur'ān al-ʿAẓīm* (Cairo: Maktabah Madbūlī, Vol. 2, 2004), Vol. 2, p. 1901.

combatant immunity to include certain other categories of non-combatants,[41] as illustrated below. Furthermore, Ibn Taymiyyah (d. 728/1328) uses this report to prove that the Islamic justification for war is the belligerence of the enemy and, therefore, the prohibition of fighting non-belligerent unbelievers. In other words, Ibn Taymiyyah here is refuting al-Shāfiʿī's claim that unbelief per se is a justification for war.[42] He confirms this by adding that if unbelief per se were a justification for war, then there would be no such prohibition against targeting unbelieving women in war.[43]

**4.2.2 The Aged**

Following the Prophet's commands, most jurists prohibited targeting the aged, though al-Shāfiʿī and Ibn Ḥazm permitted them to be targeted if they did not agree to pay the *jizyah*. Al-Ṣanaʿānī defines the aged who cannot be targeted in war as "the one who looks to be in his old age or the one who reaches the age of fifty or fifty one years of age".[44] The jurists agree that if the aged support the enemy in planning war operations, they can be targeted during the war. In his justification of targeting the aged in this case, al-Shirāzī (d. 476/1083) and al-Nawawī (d. 676/1277) argue that planning the war plays a more important contribution to winning the war than fighting itself.[45] The jurists based this ruling on the incident of the killing of Durayd

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[41] For a list of the non-combatants, see Mahmassani, "The Principles of International Law in the Light of Islamic Doctrine", p. 302 f.

[42] Aḥmad ibn ʿAbd al-Ḥalīm ibn Taymiyyah, *Qāʿidah Mukhtaṣarah fī Qitāl al-Kuffār wa Muhādanatihim wa Taḥrīm Qatlihim li-Mujarrad Kufrihim: Qāʿidah Tubayyn al-Qiyam al-Sāmiyah lil-Ḥaḍārah al-Islāmiyyah fī al-Ḥarb wa al-Qitāl*, ed. ʿAbd al-ʿAzīz ibn ʿAbd Allah ibn Ibrāhīm al-Zayd Āl Ḥamad (Riyadh: N.p., 2004/1424), p. 119.

[43] Ibid., pp. 188 f.

[44] Muḥammad ibn Ismāʿīl al-Ṣanaʿānī, *Subul al-Salām: Sharḥ Bulūgh al-Marām min Adillah al-Aḥkām*, ed. Muḥammad ʿAbd al-ʿAzīz al-Khūlī, 4th ed. (Beirut: Iḥyā' al-Turāth al-ʿArabī, 1959-60/1379), Vol. 4, p. 50.

[45] Al-Shirāzī, *Al-Muhadhdhab*, Vol. 3, pp. 277 f.; al-Nawawī, *Al-Majmūʿ*, Vol. 21, p. 55; al-Buhūtī, *Kashshāf al-Qināʿ*, Vol. 3, p. 50; al-Rahaybānī, *Maṭālib*, Vol. 2, p. 517; see also Ibn Taymiyyah, *Qāʿidah Mukhtaṣarah fī Qitāl al-Kuffār*, p. 118; Wahbah al-Zuḥaylī, *Al-ʿAlāqāt al-Dawliyyah fī al-*

ibn al-Ṣummah, who was brought to the battlefield to plan operations for the battle of Ḥunayn, even though he was over one hundred years of age.[46] Since the Prophet knew about this incident and did not condemn it, the jurists deduced that it was permissible to target the aged in such cases. Nonetheless, al-Shawkānī did not accept this deduction: he advocated that there is nothing in the Islamic sources to prove the permissibility of targeting an aged person even if he supports the army of the enemy in this case.[47]

### 4.2.3 The Blind, the Sick, the Incapacitated and the Insane

Details concerning this category are very scanty. The jurists are in agreement that it is impermissible for a Muslim army to target the blind, the sick,[48] the incapacitated and the insane.[49] Al-Thawrī permitted targeting anyone who is incapacitated if he is still physically able to fight or if he supports the enemy.[50] Concerning the insane, Abū Ḥanīfah adds that if an insane person sometimes regains his sanity, he can be targeted when he is in a state of sanity.[51] The reason that the jurists did not elaborate enough on this category is that apparently there are no Qur'ānic prescriptions or

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*Islam: Muqāranah bi-al-Qānūn al-Dawlī al-Ḥadīth* (Beirut: Mu'assasah al-Risālah, 1981/1401), p. 71.

[46] Al-Shawkānī, *Nayl al-Awṭār*, Vol. 8, p. 73; al-Shirāzī, *Al-Muhadhdhab*, Vol. 3, p. 277; Alsumaih, "The Sunni Concept of Jihad", p. 118; T.R. Copinger-Symes, "Is Osama bin Laden's '*Fatwa* Urging *Jihad* against Americans' dated 23 February 1998 Justified y Islamic Law?", in Mashood A. Baderin, ed., *International Law and Islamic Law* (Aldershot: Ashgate, 2008), p. 223.

[47] Muḥammad ibn ʿAlī ibn Muḥammad al-Shawkānī, *Al-Sayl al-Jarrār al-Mutadaffiq 'alā Ḥadā'iq al-Azhār*, ed. Maḥmūd Ibrāhīm Zāyid (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1984-5/1405), Vol. 4, p. 533.

[48] Caliph Abū Bakr prohibited targeting *al-marīḍ* (the sick), see ḥadīth number 17931 in al-Bayhaqī, *Sunan al-Bayhaqī*, Vol. 9, p. 90.

[49] Al-Kāsānī, *Badā'i' al-Ṣanā'i'*, Vol. 7, p. 101; Muwaffaq al-Dīn ʿAbd Allah ibn Aḥmad ibn Qudāmah, *'Umdah al-Fiqh*, ed. ʿAbd Allah Safar al-ʿAbdalī and Muḥammad Dughaylib al-ʿUtaybī (Taif: Maktabah al-Ṭarafayn, n.d.), p. 153; Muḥammad ibn Yūsuf ibn Abī al-Qāsim al-ʿAbdarī, *Al-Tāj wa al-Iklīl: Sharḥ Mukhtaṣar Khalīl*, 2nd ed. (Beirut: Dār al-Fikr, 1977-8/1398), Vol. 3, p. 351; Muḥammad ibn Mufliḥ, *Al-Furū'*, ed. Abī al-Zahrā' Ḥāzim al-Qāḍī (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1997/1418), Vol. 6, p. 197; Manṣūr ibn Yūnus ibn Idrīs al-Buhūtī, *Sharḥ Muntahā al-Irādāt al-Musammā Daqā'iq 'Ulī al-Nuhā Li-Sharḥ al-Muntahā*, 2nd ed. (Beirut: ʿĀlam al-Kutub, 1996),Vol. 1, pp. 624 f.; al-Buhūtī, *Kashshāf al-Qinā'*, Vol. 3, p. 50; al-Dardīr, *Al-Sharḥ al-Kabīr*, Vol. 2, p. 176; al-Rahaybānī, *Maṭālib*, Vol. 2, pp. 517 f.; al-Hindī, *Aḥkām al-Ḥarb wa al-Salām*, p. 178.

[50] Ṣaqr, *'Al-'Alāqāt al-Dawliyyah*, p. 48.

[51] Ibid.

precedents set by the Prophet in this matter. It is therefore the jurists themselves who essentially give the ruling on whether it is permissible to target them or not on the basis of the harm they can cause to the Muslim army: i.e., whether they can physically fight or provide other sorts of support to the enemy's army.

### 4.2.4 The Clergy

The jurists referred to a member of the clergy as *rāhib* (hermit, monk). In Islamic parlance, this term refers to men of religion who devote themselves to worship. They are usually described as living in a hermitage. The non-combatant immunity given to hermits is based on the Prophet's commands. Also, in his ten commands to Yazīd ibn Abū Sufyān - an army leader -, Abū Bakr reiterated the Prophet's prohibition against targeting hermits but allowed *al-shammāsah* (the tonsured) to be killed.[52] Early Muslims explained the reason why Abū Bakr permitted this by the fact that "whenever a war starts, the tonsured do fight, unlike the hermits".[53] Thus the majority of the jurists based their rulings on the prohibition of targeting hermits in war on the commands given by the Prophet and Abū Bakr and also by resorting to the principle of analogy which includes any non-combatant, based on the prohibition of targeting women. Thus, Ibn Taymiyyah states that the reason for prohibiting the targeting of hermits during war is that they are confined to their monasteries and do not engage in acts of hostility against Muslims. He adds that the jurists agree that if hermits support the army of the enemy, they can be targeted.[54] Al-Shāfiʿī specified

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[52] See, for example, ḥadīth number 965 in Anas ibn Mālik, *Muwaṭṭa' al-Imām Mālik*, ed. Muḥammad Fū'ād ʿAbd al-Bāqī (Cairo: Dār Iḥyā' al-Turāth al-ʿArabī, n.d.), Vol. 2, p. 447; ḥadīths numbers 17904, 17927 and 17929 in al-Bayhaqī, *Sunan al-Bayhaqī*, Vol. 9, pp. 85, 89 f.; ḥadīths numbers 9375 and 9377 in al-Ṣanaʿānī, *Al-Muṣannaf*, Vol. 5, pp. 199 f.; al-Nawawī, *Al-Majmūʿ*, Vol. 21, p. 58; Ibn Anas, *Al-Mudawwanah*, Vol. 3, p. 7; Mahmassani, *Al-Qānūn wa al-ʿAlāqāt*, p. 262.

[53] See ḥadīth number 17930 in al-Bayhaqī, *Sunan al-Bayhaqī*, Vol. 9, p. 90; al-Nawawī, *Al-Majmūʿ*, Vol. 21, p. 58.

[54] Aḥmad ibn ʿAbd al-Ḥalīm ibn Taymiyyah, *Majmūʿ Fatāwā Shaykh al-Islām Aḥmad Ibn Taymiyyah*, compiled by ʿAbd al-Raḥman ibn Muḥammad ibn Qāsim al-ʿĀṣimī (Cairo: Maktabah ibn Taymiyyah,

that he accepted the non-combatant immunity granted to hermits by "following Abū Bakr's command" to his army not to target the clergy.[55] Thus the jurists unanimously grant non-combatant immunity to all hermits, except for Ibn Ḥazm, who still stipulates that the hermits should either become Muslims or pay the *jizyah* in order not to be a permissible target in war.

#### 4.2.5 *Al-ʿAsīf*, Farmers, Craftsmen and Traders

*ʿAsīf* (pl. *ʿusafāʾ*) means a hired man or an employee. Generally, it refers to a person who is hired to do a service. In the war context, it refers to anyone who works for, or is paid by, the enemy to do services in the battlefield, for example, as al-Shawkānī suggests, "to mind the belongings and the animals, but not engage in fighting."[56] The prohibition against targeting this category is based on the ḥadīths of the Prophet, several of which are related to the incident of the woman who was killed in the battle of Ḥunayn. Thereupon, the Prophet sent someone to Khālid ibn al-Walīd with explicit commands not to kill a woman, a child or a hired man.[57] Therefore, since the Prophet prohibited targeting people hired to perform services for the army of the enemy in the battlefield, even if it affected the fighting operations, it is obvious that targeting any non-combatant is strictly prohibited.[58]

Furthermore, jurists extend non-combatant immunity to include *al-ḥārif al-mashghūl bi-ḥirfatih*[59] (the craftsman who is confined to his craft). Early Muslims

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n.d.), Vol. 28, p. 660. See also, for example, al-Hindī, *Aḥkām al-Ḥarb wa al-Salām*, p. 178; Alsumaih, "The Sunni Concept of Jihad", p. 119.

[55] Al-Shāfiʿī, *Al-Umm*, Vol. 4, p. 240; al-Ṭabarī, *Ikhtilāf al-Fuqahāʾ*, p. 11.

[56] Al-Shawkānī, *Al-Sayl al-Jarrār*, Vol. 4, p. 532.

[57] See ḥadīths numbers 2841 and 2842 in Ibn Mājah, *Sunan Ibn Mājah*, Vol. 2, pp. 947 f.; ḥadīths numbers 8625, 8626 and 8627 in al-Nasāʾī, *Sunan al-Nasāʾī al-Kubrā*, Vol. 5, pp. 186 f.; ḥadīths numbers 17936 and 17937 in al-Bayhaqī, *Sunan al-Bayhaqī*, Vol. 9, p. 91.

[58] See Muḥammad Khyr Haykal, *Al-Jihād wa al-Qitāl fī al-Siyyāsah al-Sharʿiyyah*, 2nd ed. (Beirut: Dār al-Bayāriq, 1996/1417), Vol. 2, pp. 1246 f.; see also Abū Zahrah, *Tanẓīm al-Islām lil-Mujtamaʿ*, p. 48.

[59] Al-Ghazālī, *Al-Waṣīṭ*, Vol. 7, p. 20.

also extended this immunity to farmers and traders on the enemy side.[60] ʿUmar ibn al-Khaṭṭāb gives written instructions specifically prohibiting targeting farmers. Zayd ibn Wahb reports that they received written instructions from ʿUmar ibn al-Khaṭṭāb which read: "Do not steal from the booty; do not betray; do not kill a child; and fear God in the farmers"[61] "and do not kill them unless they wage war against you."[62] The phrase "fear God", chosen by ʿUmar to indicate the prohibition against targeting the farmers, typifies the main concern of Muslims during the conduct of war and hence the nature of the Islamic law of war, which is to abide by the rules derived, or deduced, from the Islamic sources. The aim is to avoid doing something *ḥarām*, (impermissible), namely in this context taking a human soul unjustly, so as to deserve God's punishment in the Hereafter.[63]

The concept of non-combatant immunity is thus grounded in the Prophet's commands. The extensive literature on who may and who may be not targeted in war indicates that non-combatant immunity was a full-blown doctrine developed by the second/eighth and third/ninth century Muslim jurists.[64] Their discussions indicate the

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[60] See ḥadīth number 17939 in al-Bayhaqī, *Sunan al-Bayhaqī*, Vol. 9, p. 91; Khadduri, *War and Peace*, p. 104; Mahmassani, "The Principles of International Law in the Light of Islamic Doctrine", p. 302; Mahmassani, *Al-Qānūn wa al-ʿAlāqāt*, p. 241; Ḥammīdullāh, *Muslim Conduct of State*, p. 204; Hilmi M. Zawati, *Is Jihad a Just War? War, Peace, and Human Rights under Islamic and Public International Law*, Studies in Religion and Society Vol. 53 (Lewiston, NY: Edwin Mellen Press, 2001), p. 44; Ali Raza Naqvi, "Laws of War in Islam", *Islamic Studies*, Vol. XIII, No. 1, March 1974, p. 32; Romahi, *Studies in International Law*, p. 64; Weeramantry, *Islamic Jurisprudence*, p. 136.

[61] See Ibn Rushd, *Bidāyah al-Mujtahid*, Vol. 1, p. 281; Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 251; al-Rahaybānī, *Maṭālib*, Vol. 2, p. 518; Peters, *Jihad in Classical and Modern Islam*, p. 35; Mahmassani, *Al-Qānūn wa al-ʿAlāqāt*, p. 242; al-Hindī, *Aḥkām al-Ḥarb wa al-Salām*, p. 178; al-Ḥifnī, *Mawsūʿah al-Qur'ān*, Vol. 2, p. 1887.

[62] See ḥadīth number 17938 in al-Bayhaqī, *Sunan al-Bayhaqī*, Vol. 9, p. 91; Abū ʿĪd, *Al-ʿAlāqāt al-Dawliyyah fī al-Fiqh al-Islāmī*, p. 174. See also al-Buhūtī, *Kashshāf al-Qināʿ*, Vol. 3, p. 50; Yūsuf al-Qaraḍāwī, *Fiqh al-Jihād: Dirāsah Muqāranah li-Aḥkāmih wa Falsafatih fī Ḍaw' al-Qur'ān wa al-Sunnah* (Cairo: Maktabah Wahbah, 2009),Vol. 1, p. 736.

[63] See Zayd ibn ʿAbd al-Karīm al-Zayd, *Muqaddimah fī al-Qānūn al-Dawlī al-Insānī fī al-Islām* (N.p.: Comité International Genève, ICRC, 2004), pp. 80 f.; Marcel A. Boisard, "The Conduct of Hostilities and the Protection of the Victims of Armed Conflict in Islam", *Hamdard Islamicus*, Vol. 1, No. 2, Autumn 1978, p. 13.

[64] According to Bedjaoui: "This [Islamic] rule that combatants should be spared unnecessary suffering, together with the rules for the protection of civilian population and the fundamental distinction between combatants and non-combatants, already featured in seventh-century slam, constitute one of the foundations of humanitarian international law as codified in the 20th century",

distinct nature of Islamic law. Simply put, in the words of Johnson, "The [Islamic] position is clear: there is no justification for warfare directed intentionally against noncombatants in *jihad*."[65] Despite the fact that he has written several works on the tradition of war in Islam, Kelsay admits here that "the present state of our knowledge [Western scholars on the law of war in Islam] is short on details."[66] Fred M. Donner adds that "It is still much too early, however, to be able to identify a clear canon of fundamental Islamic texts on warfare. Too many texts remain unstudied."[67] In other words, this admitted lack of knowledge of the Islamic regulations for the conduct of war on the part of Western scholars, despite the fact that these scholars have noted that the classical jurists paid the greatest attention to the Islamic *jus in bello*, is partly the simple result of a lack of Islamic texts in European languages.

**4.3 Human Shields**

The second major issue dealt with by the jurists is whether it is permissible or not to attack enemy combatants if they turn non-combatant individuals into human shields. This practice is referred to as *tatarrus* and the context is that during hostilities, enemy combatants, whether inside a fortress or not, may make use of human shields to protect themselves from the Muslim army's attack. In order to attack the enemy in the war context of the classical Muslim jurists, the Muslim army would need to use

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Mohammed Bedjaoui, "The Gulf War of 1980-1988 and the Islamic Conception of International Law", in Ige F. Dekker and Harry H.G. Post, eds., *The Gulf War of 1980-1988: The Iran-Iraq War in International Legal Perspective* (Dordrecht: Martinus Nijhoff, 1992), p. 290.

[65] Johnson, *Morality and Contemporary Warfare*, p. 186. See also Alsumaih, "The Sunni Concept of Jihad", p. 120; John L. Esposito, *Unholy War: Terror in the Name of Islam* (Oxford: Oxford University Press, 2002), p. 32; Muhammad Munir, "Suicide Attacks and Islamic Law", *International Review of the Red Cross*, Vol. 90, No. 869, March 2008, pp. 84-86.

[66] Kelsay, *Islam and War*, p. 60.

[67] Fred M. Donner, "The Sources of Islamic Conceptions of War", in John Kelsay and James Turner Johnson, eds., *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions* (Westport, Conn.: Greenwood Press, 1991), p. 32.

mangonels (a weapon for catapulting large stones),[68] which might lead to casualties among non-combatants. In the discussion of this issue, most of the jurists, though not all, distinguish between two cases: first, if the enemy combatants take individuals who enjoy non-combatant immunity, such as their women, children and the aged as human shields; and, second, if the enemy take any Muslim individuals, in general, or Muslim prisoners of war, or individuals from *ahl al-dhimmah* (non-Muslim citizens of the *dār al-Islām*)[69] or any individuals who "*baynanā wa baynahum amān* (belong to a country with which we [Muslims] have a peace accord)".[70]

Concerning the first case, al-Awzāʿī and the Mālikī jurists argue that it is permissible because of military necessity to direct mangonels at the enemy, provided that Muslims aim to direct their attack at the combatants and avoid injuring women and children.[71] In justification of the permissibility of attacking the enemy in this case, al-Shirāzī argues that Muslims would be defeated if they stopped fighting,[72] while Ibn Qudāmah argues that the enemy could deliberately resort to turning their women and children into human shields to force the Muslim army to stop the war.[73]

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[68] See, for example, al-Shāfiʿī, *Al-Umm*, Vol. 4, p. 288; Muḥammad ibn Abī al-ʿAbbās Aḥmad ibn Ḥamzah al-Ramlī, *Nihāyah al-Muḥtāj ilā Sharḥ al-Minhāj* (Beirut: Dār al-Fikr, 1984/1404), Vol. 7, p. 407; Ibn ʿĀbidīn, *Ḥāshiyah Radd al-Muḥtār*, Vol. 4, p. 129.

[69] Hereafter *dhimmi* for singular and *dhimmis* for plural. On *dhimmis* in Islamic law see, ʿAbd al-Karīm Zīdān, *Aḥkām al-Dhimmiyyn wa al-Musta'minīn fī Dār al-Islām* (Beirut: Mu'assasah al-Risālah; Baghdad: Maktabah al-Quds, 1982/1402), pp. 22-45; Afīfī, *Al-Mujtamaʿ al-Islāmī*, pp. 57-59, 87-90, 261-267; al-Mawdūdī, *Sharīʿah al-Islām fī al-Jihād*, pp. 222-232; Yūsuf al-Qaraḍāwī, *Non Muslims in the Islamic State*, trans. Khalil Muhammad Hammad and Sayed Mahboob Ali Shah (Indianapolis: American Trust Publication, 1985); Yūsuf al-Qaraḍāwī, *Al-Ḥalāl wa al-Ḥarām fī al-Islām*, 2nd ed. (Cairo: Maktabah Wahbah, 1997/1418), pp. 292 f.; Ismāʿīl Luṭfī Faṭānī, *Ikhtilāf al-Dārīn wa Atharuh fī Aḥkām al-Munākaḥāt wa al-Muʿāmalāt*, 2nd ed. (Cairo: Dār al-Salām, 1998/1418), pp. 113-125; al-Hindī, *Aḥkām al-Ḥarb wa al-Salām*, pp. 13-18; ʿAbdur Raḥmān I. Doi, *Sharīʿah: The Islamic Law* (London: Ta Ha, 1984/1404), pp. 426-435; Edward D.A. Hulmes "Dhimmis", in Ian Richard Netton, *Encyclopedia of Islamic Civilization and Religion* (Oxford: Routledge, 2008), p. 144.

[70] Al-Nawawī, *Al-Majmūʿ*, Vol. 21, p. 60.

[71] Ibn Qudāmah, *Al-Kāfī*, Vol. 4, p. 126; al-Nawawī, *Al-Majmūʿ*, Vol. 21, p. 59; al-Māwardī, *Al-Aḥkām al-Sulṭāniyyah*, p. 57; al-Shirāzī, *Al-Muhadhdhab*, Vol. 3, p. 278; Najīb al-Armanāzī, *Al-Sharʿ al-Dawlī fī al-Islām*, 2nd ed. (Damascus: 1930; London: Riad El-Rayyes Books Ltd, 1990), p. 124; Haykal, *Al-Jihād wa al-Qitāl*, Vol. 2, p. 1334.

[72] Al-Shirāzī, *Al-Muhadhdhab*, Vol. 3, p. 278.

[73] Ibn Qudāmah, *Al-Kāfī*, Vol. 4, p. 231.

As for the second case, the jurists give two contradictory rulings: according to al-Awzāʿī, the Mālikī jurists, al-Lū'lū'ī, Abū Thawr, al-Layth and Aḥmad ibn Ḥanbal, it is impermissible to attack the enemy if they take as human shields Muslims, *dhimmis* or any individuals who belong to a country with which Muslims have a peace accord.[74] They base this ruling on the Qur'ān "had they [believing Muslim men and women] been separated, We would have inflicted a severe chastisement on those who disbelieved from among them [the Meccans]" (Qur'ān 48:25).

However, the majority of the jurists, including Abū Ḥanīfah, Abū Yūsuf (d. 182/798) and al-Thawrī, advocate that it is permissible in this case to attack the enemy because of military necessity, provided that the Muslim army intends to direct its attack against the combatants and avoid the human shields.[75] For al-Māwardī (d. 450/1058), the military necessity in this case would arise from the risk of a Muslim defeat; apart from that, it is impermissible to attack the enemy in these circumstances.[76] Furthermore, the Andalusian exegete-jurist al-Qurṭubī (d. 671/1272) states that the attack is justified solely in cases involving "the absolute and definitely clear interest of the Muslims", namely, avoiding the collapse of the entire Muslim nation into the hands of the enemy.[77] Other jurists add that, if the Muslim army will be defeated if the human shield is not attacked, it is permissible to attack the human shield because of the obligation to protect the lives of the Muslim army. Additionally, if the number of the Muslim prisoners of war is very few, it is permissible to attack the human shield because the likelihood of injuring the Muslim

[74] See, for example, al-Ṭabarī, *Ikhtilāf al-Fuqahā'*, pp. 4-8; al-Armanāzī, *Al-Shar' al-Dawlī*, p. 124; Haykal, *Al-Jihād wa al-Qitāl*, Vol. 2, pp. 1331-1334.
[75] See, for example, al-Ṭabarī, *Ikhtilāf al-Fuqahā'*, pp. 5-7.
[76] Al-Māwardī, *Al-Aḥkām al-Sulṭāniyyah*, p. 57.
[77] Muḥammad ibn Aḥmad al-Anṣārī al-Qurṭubī, *Al-Jāmi' li-Aḥkām al-Qur'ān* (Cairo: Dār al-Shaʿb, n.d.), Vol. 16, pp. 287 f.

prisoners is very slight. But if there are a great many Muslim prisoners, then it is impermissible to attack, because there is a strong possibility that the Muslims might be injured.[78]

In such cases, each individual jurist weighed the sanctity of human life against the military necessity of winning the war. Some jurists also explored different military situations, such as if the enemy were to take the human shield inside a fortress or inside a house, in which cases the degree of likelihood of injuring the human shield would vary. In such cases, both the permissibility and impermissibility of these attacks are advocated. Later generations of jurists restate these different positions sometimes without endorsing any of them.

It is worth adding here that some jurists, such as al-Shaybānī and al-Shāfiʿī, do not distinguish in their discussion of the permissibility of attacking human shields between those who enjoy non-combatant immunity and Muslims, *dhimmis* or any individuals who belong to a country with which Muslims have a peace accord. Al-Shaybānī maintains that it is permissible to attack human shields if the enemy combatants take as shields Muslim men, or children or non-combatant “women, the aged, children, the blind, the incapacitated or the insane from the *dār al-ḥarb*.”[79]

This typical jurisprudential discourse indicates the impracticality of providing a specific position as being representative of Islamic law simply because, in such cases, the jurists gave conflicting rulings. Thus, the best approach in the discussion of these Islamic legal issues is to relate such rulings to the jurists who advocated them. Concerning the application of these rulings, it would be left to the Muslims in question to decide which rulings to endorse. The main point to be concluded from the discussion of this issue is that most of the jurists override the Qur’ānic injunction

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[78] Al-Nawawī, *Al-Majmūʿ*, Vol. 21, p. 60.
[79] Al-Shaybānī, *Al-Siyar*, p. 135.

(48:25) on the basis of the principle of Muslim public interest, judging that it would be in the interest of the Muslims to attack the enemy even though this might lead to casualties among innocent non-combatants, Muslim captives, *dhimmis* or any individuals who belong to a country with which Muslims have a peace accord, despite the fact that the Qur'ān gives a different ruling in a similar situation (48:25).

### 4.4 Night Attack

The third issue that is strongly linked to the lives of the enemy is *bayāt* (night attack). The term *bayāt* is defined as arriving for battle in enemy territory during the night.[80] The enemy are taken by surprise because they are not warned of the approaching army, first, because it is dark and second, because they may be asleep. The element of surprise here is significant because it is against the Islamic rules of combat to initiate acts of hostility except as a third option, namely after the enemy's refusal to accept Islam or to conclude a peace treaty with the Muslims.[81]

According to a ḥadīth narrated by Anas ibn Mālik: "whenever the Prophet reached a people by night, he never started an attack until it was morning."[82] However, according to another ḥadīth narrated by al-Ṣaʿb ibn Jaththāmah: "the Prophet was asked if it was permissible to attack the enemy by night which may result in casualties among women and children. Then, the Prophet replied that they

[80] Lane, *An Arabic-English Lexicon*, Vol. 1, p. 281; al-Fayyūmī, *Al-Miṣbāḥ al-Munīr*, Vol. 1, p. 68.
[81] See, for example, Abū Zahrah, *Tanẓīm al-Islām lil-Mujtamaʿ*, pp. 48 f.; Khadduri, *War and Peace*, pp. 94-101; al-Hindī, *Aḥkām al-Ḥarb wa al-Salām*, pp. 147-152; ʿUmar Aḥmad al-Firjānī, *Uṣūl al-ʿAlāqāt al-Dawliyyah fī al-Islām*, 2nd ed. (Tripoli, Libya: Dār Iqra', 1988/1397), pp. 102-104; Ṣaqr, *Falsafah al-Ḥarb*, p. 109; ʿAbd al-Laṭīf ʿĀmir, *Aḥkām al-Asrā wa al-Sabāyā fī al-Ḥurūb al-Islāmiyyah* (Cairo: Dār al-Kitāb al-Miṣrī; Beirut: Dār al-Kitāb al-Lubnānī, 1986/1406), pp. 64 f.; Mohamed Mokbel Mahmud Elbakry, "The Legality of 'War' in Al-Shariʿa Al-Islamiya (The Islamic Law) and Contemporary International Law: Comparative Study" (PhD thesis, University of Glasgow, 1987), p. 312; Malik Abdulazeez al-Mubarak, "Warfare in Early Islam" (PhD thesis, University of Glasgow, 1997), pp. 166-169.
[82] Ḥadīth number 2785 in Muḥammad ibn Ismāʿīl al-Bukhārī, *Al-Jāmiʿ al-Ṣaḥīḥ al-Mukhtaṣar*, ed. Muṣṭafā Dīb al-Baghā, 3rd ed. (Damascus; Beirut: Dār ibn Kathīr, 1987/1407), Vol. 3, p. 1077.

[women and children] are from them [the enemy warriors]".[83] Based on the later ḥadīth, the majority of the jurists permitted attacking the enemy by night,[84] though some jurists still maintained that it was reprehensible.[85] The concern of the man who asked the Prophet about the permissibility of the night attack is precisely the likelihood of endangering the lives of women and children. Nonetheless, al-Shāfiʿī presumes that the reason the Prophet never initiated an attack by night was to avoid being ambushed by the enemy or lest Muslims might mistakenly kill each other because of the darkness.[86]

The jurists mainly linked the night attack with using mangonels because during the night the two armies would not be able to fight hand to hand because of the darkness. So, if Muslims were to initiate an attack by night, they would use mangonels to direct stones at the enemy, which might injure non-combatants such as women and children. Any casualties that might occur among women and children, the jurists maintain, are justified solely as collateral damage.[87] Here also the jurists give no details concerning this issue. They are merely satisfied with stating that it is acceptable to attack the enemy by night based on the ḥadīth narrated by ibn Jaththāmah.

In both issues, *tatarrus* and *bayāt* the majority of the classical jurists permitted attacking the enemy under the above strict conditions and within specific

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[83] See, for example, ḥadīth number 2850 in al-Bukhārī, *Al-Jāmiʿ al-Ṣaḥīḥ al-Mukhtaṣar*, Vol. 3, p. 1097; ḥadīth number 1745 in Muslim ibn al-Ḥajjāj al-Qushayrī, *Ṣaḥīḥ Muslim*, ed. Muḥammad Fū'ād ʿAbd al-Bāqī (Beirut: Dār Iḥyā' al-Turāth al-ʿArabī, n.d.), Vol. 3, pp. 1364 f.; ḥadīth number 2839 in Ibn Mājah, *Sunan Ibn Mājah*, Vol. 2, p. 947; see ḥadīths numbers 9385 and 9386 in al-Ṣanaʿānī, *Al-Muṣannaf*, Vol. 5, p. 202.

[84] See, for example, al-Shāfiʿī, *Al-Umm*, Vol. 4, p. 252; al-Shirāzī, *Al-Muhadhdhab*, Vol. 3, pp. 278 f.; Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 230; Ibn Ḥazm, *Al-Muḥallā*, Vol. 7, p. 296; al-Shawkānī, *Nayl al-Awṭār*, Vol. 8, pp. 71 f.; al-Sayyid Sābiq, *Fiqh al-Sunnah* (Cairo: Al-Fatḥ lil-Iʿlām al-ʿArabī, n.d.), Vol. 3, p. 45.

[85] Muḥammad ibn ʿIsā al-Tirmidhī, *Al-Jāmiʿ al-Ṣaḥīh Sunan al-Tirmidhī*, ed. Aḥmad Muḥammad Shākir et al. (Beirut: Dār Iḥyā' al-Turāth al-ʿArabī, n.d.), Vol. 4, p. 121.

[86] Al-Shāfiʿī, *Al-Umm*, Vol. 4, p. 252.

[87] Al-Shawkānī, *Nayl al-Awṭār*, Vol. 8, p. 71.

war contexts. In these war contexts, attacking the enemy might lead to casualties among Muslim prisoners of war or innocent non-Muslim non-combatants as a result of directing stones or arrows at the enemy. Some terrorist Muslim groups have justified acts of indiscriminate killing of Muslims and non-Muslim non-combatants, such as the terrorist attacks currently taking place in Iraq, in order to attack specific targets, whether Muslim governments or foreign entities, by drawing an analogy with the case of *tatarrus*.[88] Apart from the specific conditions laid down by the majority of classical jurists, who permitted attacking human shields or initiating night attacks, the analogy here is flawed because the classical jurists were addressing a context of war between two armies.

### 4.5 Mutilation

At the battle of Uḥud, the bodies of many Muslims including the Prophet's uncle were horrifyingly mutilated, so the Prophet and other Muslims vowed to mutilate the enemies' bodies if they had the chance. Following the Qur'ānic revelation (16:126-127), as maintained by the majority of the exegetes and jurists, the Prophet prohibited mutilation. Among the Prophet's instructions concerning the conduct of Muslims during war are: "do not betray and do not mutilate".[89] Abū Bakr and ʿUmar ibn al-Khaṭṭāb passed the same instructions on to their armies. Abū Bakr wrote to one of his governors in Hadramaut, Yemen: "Beware of mutilation, because it is a

[88] http://www.islamtoday.net/nawafeth/artshow-42-14299.htm; Internet; accessed 13 August 2009; http://www.islamonline.net/servlet/Satellite?pagename=IslamOnline-Arabic-Ask_Scholar/FatwaA/FatwaA&cid=1122528623684; Internet; accessed 27 October 2008; http://www.alarabiya.net/programs/2007/11/11/41528.html; Internet; accessed 27 October 2008.

[89] See, for example, ḥadīth number 966 in Ibn Mālik, *Muwaṭṭa'*, Vol. 2, p. 448; ḥadīths numbers 1408 and 1617 in al-Tirmidhī, *Sunan al-Tirmidhī*, Vol. 2, p. 22, Vol. 4, p. 162; ḥadīth number 2857 in Ibn Mājah, *Sunan Ibn Mājah*, Vol. 2, p. 953; ḥadīth number 2613 in Abū Dāwūd, *Sunan Abī Dāwūd*, Vol. 3, p. 37; ḥadīth number 1731 al-Qushayrī, *Ṣaḥīḥ Muslim*, Vol. 3, p. 1357; ḥadīths numbers 9428 and 8430 in al-Ṣanaʿānī, *Al-Muṣannaf*, Vol. 5, pp. 218, 220. See also for the prohibition of mutilation, ḥadīths numbers 2342 and 5197 in al-Bukhārī, *Al-Jāmiʿ al-Ṣaḥīḥ al-Mukhtaṣar*, Vol. 2, p. 875, Vol. 5, p. 2100; Alsumaih, "The Sunni Concept of Jihad", p. 124.

sin and a disgusting act."[90] According to a ḥadīth reported by Abū Hurayrah, the Prophet instructed the Muslims to avoid the enemy's face during the fighting.[91]

Furthermore, the Prophet forbade the torture and mutilation of animals. According to ḥadīth literature, when the Prophet once passed a group of people who were shooting arrows at a sheep, he abhorred their action and added: "do not mutilate animals".[92] The Prophet also says: "God curses the one who mutilates animals."[93] Several ḥadīths also state that anyone who kills an animal, a bird or certain insects unjustly will be held responsible for it on the day of judgement.[94] Furthermore,

[90] Quoted in Ṣaqr, *'Al-'Alāqāt al-Dawliyyah*, p. 57.

[91] See, for example, ḥadīth number 715 in Hibah Allah ibn al-Ḥasan ibn Manṣūr al-Lākā'ī, *Sharḥ Uṣūl I'tiqād Ahl al-Sunnah wa al-Jamā'ah min al-Kitāb wa al-Sunnah wa Ijmā' al-Ṣaḥābah*, ed. Aḥmad Saʿd Ḥamdān (Riyadh: Dār Ṭībah, 1981-2/1402), Vol. 3, p. 423; ḥadīth number 2458 in Muḥammad ibn Fattūḥ al-Ḥumaydī, *Al-Jam' bayn al-Ṣaḥīḥayn al-Bukhārī wa Muslim*, ed. ʿAlī Ḥusayn al-Bawwāb, 2nd ed. (Beirut: Dār ibn Ḥazm, 2002/1423), Vol. 3, pp. 210 f.; ḥadīth number 516 in Aḥmad ibn ʿAmr ibn Abī ʿĀṣīm al-Ḍaḥḥāk, *Kitāb al-Sunnah*, ed. Muḥammad Nāṣir al-Dīn al-Albānī (Beirut: Al-Maktab al-Islāmī, 1979-80/1400), Vol. 1, p. 228; Sayyid Quṭb, *Fī Ẓilāl al-Qur'ān* (Beirut: Dār al-Shurūq, 1982), Vol. 1, p. 188; Ṣaqr, *'Al-'Alāqāt al-Dawliyyah*, p. 56; Mahmassani, "The Principles of International Law in the Light of Islamic Doctrine", p. 303; Mahmassani, *Al-Qānūn wa al-'Alāqāt*, p. 244.

[92] See, for example, ḥadīth number 4529 in al-Nasā'ī, *Sunan al-Nasā'ī al-Kubrā*, Vol. 3, p. 72; ḥadīth number 4440 in Aḥmad ibn Shuʿayb al-Nasā'ī, *Al-Mujtabā min al-Sunan*, ed. ʿAbd al-Fattāḥ Abū Ghuddah, 2nd ed. (Aleppo: Maktab al-Maṭbūʿāt al-Islāmiyyah, 1986/1406), Vol. 7, p. 238; ḥadīth number 8418 in al-Mubārak ibn Muḥammad ibn al-Athīr, *Mu'jam Jāmi' al-Uṣūl fī Aḥādīth al-Rasūl* (N.p.: n.d.), Vol. 10, p. 751; Yūsuf ibn al-Zakī ʿAbd al-Raḥman al-Mizzī, *Tahdhīb al-Kamāl*, ed. Bashshār ʿAwwad Maʿrūf (Beirut: Mu'assasah al-Risālah, 1980/1400), Vol. 28, p. 198; ḥadīth number 25333 in Jalāl al-Dīn al-Suyūṭī, *Jāmi' al-Aḥādīth: Al-Jāmi' al-Ṣaghīr wa Zawā'iduh wa al-Jāmi' al-Kabīr* (N.p: n.d.), Vol. 8, p. 187; ḥadīth number 13646 in Jalāl al-Dīn al-Suyūṭī, *Al-Fatḥ al-Kabīr fī Ḍamm al-Ziyādah ilā al-Jāmi' al-Ṣaghīr*, ed. Yūsuf al-Nabahānī (Beirut: Dār al-Fikr, 2003/1423), Vol. 3, p. 325; ḥadīth number 91 in ʿAbd Allah ibn Muḥammad al-Baghawī, *Ḥadīth Muṣ'ab Ibn 'Abd Allah al-Zubayrī*, ed. Ṣāliḥ ʿUthmān al-Laḥḥām (Amman: Al-Dār al-ʿUthmāniyah, 2003/1224), p. 74; Badr al-Dīn Maḥmūd ibn Aḥmad al-ʿAynī, *'Umdah al-Qārī: Sharḥ Ṣaḥīḥ al-Bukhārī* (Beirut: Dār Iḥyā' al-Turāth al-ʿArabī, n.d.), Vol. 21, p. 125; ḥadīth number 39972 in ʿAlā' al-Dīn ʿAlī al-Muttaqī ibn Ḥusām al-Dīn, *Kanz al-'Ummāl fī Sunan al-Aqwāl wa al-Af'āl*, ed. Maḥmūd ʿUmar al-Dumyāṭī (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1998/1419), Vol. 15, p. 16; ḥadīth number 6790 Aḥmad ibn ʿAlī ibn al-Muthannā, *Musnad Abī Ya'lā*, ed. Ḥusayn Salīm Asad (Damascus: Dār al-Ma'mūn lil-Turāth, 1984/1404), Vol. 12, p. 162; Ibn Ḥazm, *Al-Muḥallā*, Vol. 7, pp. 295 f.

[93] See, for example, ḥadīths numbers 184 and 185 in Muḥammad ibn ʿAbd al-Wāḥid ibn Aḥmad, *Al-Aḥādīth al-Mukhtārah*, ed. ʿAbd al-Malik ibn ʿAbd Allah ibn Duhaysh (Mecca: Maktabah al-Nahḍah al-Ḥadīthah, 1990/1410), Vol. 9, pp. 198 f.; ḥadīth number 4442 in al-Nasā'ī, *Al-Mujtabā*, Vol. 7, p. 238; ḥadīth number 8416 in Ibn al-Athīr, *Mu'jam Jāmi' al-Uṣūl fī Aḥādīth al-Rasūl*, Vol. 10, p. 750.

[94] See, for example, ḥadīths numbers 39968 to 39988 in Ibn Ḥusām al-Dīn, *Kanz l-'Ummāl*, Vol. 15, pp. 15-17; ḥadīth number 8419 in Ibn al-Athīr, *Mu'jam Jāmi' al-Uṣūl fī Aḥādīth al-Rasūl*, Vol. 10, pp. 751 f.

affirming the absolute prohibition of mutilation, the Prophet forbade mutilation even if it was the body of *al-kalb al-ʿaqūr* (rabid dog).[95]

Based on these clear and specific commands of the Prophet, the majority of the jurists maintain this strict prohibition of mutilation and torture. However, some jurists hold that mutilation is reprehensible rather than totally prohibited. Hence, they argue that Muslims can resort to mutilation if the enemy mutilates the bodies of Muslims or if it is in the interest of Muslims,[96] i.e., if it will lead to winning the war. In their discussion of mutilation, the jurists refer to only one case, namely, carrying back the head of the enemy's military leaders to the Muslim territories. It seems that this was a practice known in the wars between the Persians and the Byzantines, intended as a sign of victory.

Al-Zuhrī states that it never happened that a severed head was brought to the Prophet.[97] When the severed head of a Syrian chief army commander called Yannāq al-Biṭrīq[98] was brought to the first caliph Abū Bakr (r. 632-634), he denounced this heinous act. When he was told in justification that this was in retaliation because the Syrians had done the same to the Muslims, Abū Bakr, significantly, rebuked the speaker in the following words: "Are we going to follow the Persians and the Romans? We have what is enough: the book [the Qur'ān] and the reports [i.e., tradition of the Prophet]."[99] Furthermore, Abū Bakr went to the pulpit and addressed

[95] Al-Sarakhsī, *Kitāb al-Mabsūt*, Vol. 9, pp. 135, 196, Vol. 10, pp. 129, 131, Vol. 16, p. 145, Vol. 26, p. 175.
[96] Al-Shawkānī, *Nayl al-Awṭār*, Vol. 8, p. 74; Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 261.
[97] Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 261; al-Zayd, *Al-Qānūn al-Dawlī al-Insānī*, p. 47; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, p. 738.
[98] Al-Biṭrīq is a "Roman word which means a chief army commander", see Muḥyī al-Dīn ibn Sharaf al-Nawawī, *Tahdhīb al-Asmā' wa al-Lughāt* (Beirut: Dār al-Fikr, 1996), Vol. 2, pp. 459, 595.
[99] See, for example, al-Shaybānī, *Al-Siyar al-Kabīr*, Vol. 1, p. 110; ḥadīth number 33616 in ʿAbd Allah ibn Muḥammad ibn Abī Shaybah, *Al-Kitāb al-Muṣannaf fī al-Aḥādīth wa al-Āthār*, ed. Kamāl Yūsuf al-Ḥūt (Riyadh: Maktabah al-Rushd, 1988-9/1409), Vol. 6, p. 534; ḥadīth number 2649 in Saʿīd ibn Manṣūr, *Sunan Saʿīd Ibn Manṣūr*, ed. Ḥabīb al-Raḥman al-Aʿẓamī (India: Al-Dār al-Salafiyyah, 1982/1403), Vol. 2, p. 287; ḥadīth number 8673 in al-Nasā'ī, *Sunan al-Nasā'ī al-Kubrā*, Vol. 5, p. 204; ḥadīth number 846 in al-Suyūṭī, *Jāmiʿ al-Aḥādīth*, Vol. 13, p. 209; al-Nawawī, *Al-Majmūʿ*, Vol. 21, p. 80; Ibn Qudāmah, *Al-Kāfī*, Vol. 4, p. 129; al-Buhūtī, *Sharḥ Muntahā al-Irādāt*, Vol. 1, p. 624;

the Muslim public concerning this issue confirming that this un-Islamic act is "*sunnah al-ʿajam*"[100] (a practice followed among the non-Muslims, lit. foreigners). Therefore, Abū Bakr's reply precisely and exactly indicates the self-binding nature, and the core objective, of Islamic law. In other words, following Islamic law is in itself an objective for the Muslims, irrespective of their enemy's behaviour.

Nonetheless, despite the explicit prohibition of mutilation by the Prophet and his succeeding caliphs, al-Māwardī and al-Shawkānī permit carrying the heads of the military leaders of the enemy to the Muslims' lands, provided that this is in the interest of the Muslim army.[101] This means that a few jurists compromised on the Islamic rules for the sake of the public interest of the Muslims.

After the cessation of hostilities, the bodies of the enemy warriors should be handed over to the enemy if they require it, otherwise Muslims are to bury them. In general, the jurists' position is in agreement with Article 17 of the first Geneva Convention (1949). According to several reports, the Prophet always ensured the burial of the dead, irrespective of whether the bodies belonged to the Muslims or their enemy.[102] Ibn Ḥazm advocated that it was obligatory for Muslims to bury the

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al-Buhūtī, *Kashshāf al-Qināʿ*, Vol. 3, p. 61; al-Rahaybānī, *Maṭālib*, Vol. 2, pp. 519 f.; al-Armanāzī, *Al-Sharʿ al-Dawlī*, p. 125; Ṣaqr, *Al-ʿAlāqāt al-Dawliyyah*, p. 57; Aḥmad Abū al-Wafā, *Al-Naẓariyyah al-ʿĀmmah lil-Qānūn al-Dawlī al-Insānī fī al-Qānūn al-Dawlī wa fī al-Sharīʿah al-Islāmiyyah* (Cairo: Dār al-Nahḍah al-ʿArabiyyah, 2006), pp. 168 f., 208; al-Zayd, *Al-Qānūn al-Dawlī al-Insānī*, p. 48; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, p. 738; Yadh Ben Ashoor, *Islam and International Humanitarian Law* (N.p.: International Committee of the Red Cross, 1980), p. 7; A.B.M. Mafizul Islam *Patwari*, *Principles of International Humanitarian Law: An Oriental Perspective* (Dhaka: Asiatic Society of Bangladesh, 1994), p. 31.

[100] Aḥmad ibn ʿAlī ibn Ḥajar al-ʿAsqalānī, *Al-Iṣābah fī Tamyīz al-Ṣaḥābah*, ed. ʿAlī Muḥammad al-Bijāwī (Beirut: Dār al-Jīl, 1992/1412), Vol. 5, p. 130; ḥadīth number 847 in al-Suyūṭī, *Jāmiʿ al-Aḥādīth*, Vol. 13, p. 209; ḥadīth number 18132 in al-Bayhaqī, *Sunan al-Bayhaqī*, Vol. 9, p. 132; ḥadīth number 11729 in Ibn Ḥusām al-Dīn, *Kanz al-ʿUmmāl*, Vol. 4, p. 251; al-Qarāfī, *Al-Dhakhīrah*, Vol. 3, p. 408; al-Zayd, *Al-Qānūn al-Dawlī al-Insānī*, p. 48.

[101] Al-Nawawī, *Al-Majmūʿ*, Vol. 21, p. 80; al-Shawkānī, *Nayl al-Awṭār*, Vol. 8, p. 74; al-Shawkānī, *Al-Sayl al-Jarrār*, Vol. 4, p. 568.

[102] See, for example, ḥadīth number 1568 in Aḥmad ibn ʿAmr ibn Abī ʿĀṣīm al-Ḍaḥḥāk, *Al-Āḥād wa al-Mathānī*, ed. Bāsim Fayṣal Aḥmad al-Jawābirah (Riyadh: Dār al-Rāyah, 1991/1411), Vol. 3, p. 211; Muḥammad ibn Yūsuf al-Ṣāliḥī, *Subul al-Hudā wa al-Rashād fī Sīrah Khayr al-ʿIbād*, ed. ʿĀdil Aḥmad ʿAbd al-Mawjūd and ʿAlī Muḥammad Muʿawwad (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1993-4/1414), Vol. 4, p. 85; ḥadīth number 6409 in al-Bayhaqī, *Sunan al-Bayhaqī*, Vol. 3, p. 386; ʿAlī ibn ʿUmar al-Dāraquṭnī, *Sunan al-Dāraquṭnī*, ed. al-Sayyid ʿAbd Allah Hāshim Yamānī al-Madanī

enemy dead because if they did not, it would be tantamount to mutilation, which is prohibited by the Prophet.[103] Nothing should be accepted in return for handing over the bodies of the enemies. At the Battle of the Trench, Nawfal ibn ʿAbd Allah ibn al-Mughīrah died when he attempted to jump the trench with his horse. When the Meccans offered payment for receiving the body of Nawfal, the Prophet gave them the body and refused their offer.[104] Nonetheless, al-Nawawī and Ibn Ḥajar al-ʿAsqalānī argue that Muslims should not inter the bodies of the enemy, except for reasons of public health.[105]

Therefore, to a certain extent, one finds each individual jurist undertaking an ongoing process of negotiation between the constraints laid down by the Islamic sources on the conduct of hostilities and the military necessity of winning the war.[106] On the one hand, it becomes a hard task for researchers to state the precise position of Islamic laws in such cases. On the other, it becomes easy to present Islamic laws as, taking the above instances as examples, either a set of humane laws that prohibit torture or mutilation, even of a dangerous rabid dog, or as a set of laws that permits Muslims to cut off the heads of their enemies' military leaders. It is thus confirmed

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(Beirut: Dār al-Maʿrifah, 1966/1386), Vol. 4, p. 116; al-ʿAynī, *'Umdah al-Qārī*, Vol. 3, p. 176; Muḥammad al-Khuḍarī, *Nūr al-Yaqīn fī Sīrah Sayyid al-Mursalīn*, ed. Aḥmad Maḥmūd Khaṭṭāb (Al-Mansurah, Egypt: Maktabah al-Īmān, 1999/1419), p. 102; Abū al-Wafā, *Al-Naẓariyyah al-'Āmmah*, pp. 206-209; al-Zayd, *Al-Qānūn al-Dawlī al-Insānī*, pp. 49, 78; ʿAbd al-Salām Bilājī, "Sharīʿah al-Ḥarb fī al-Sīrah al-Nabawiyyah al-Sharīfah", in Fārūq Ḥamādah, ed., *Al-Tashrī' al-Dawlī fī al-Islām*, Nadawāt wa Munāẓarāt, No. 70 (Rabat: Kulliyyah al-Ādāb wa al-ʿUlūm al-Insāniyyah, 1997), p. 124; Alsumaih, "The Sunni Concept of Jihad", p. 125.

[103] Ibn Ḥazm, *Al-Muḥallā*, Vol. 5, p. 117.

[104] See, for example, Aḥmad ibn ʿAlī ibn Ḥajar al-ʿAsqalānī, *Fatḥ al-Bārī Sharḥ Ṣaḥīḥ al-Bukhārī*, ed. Muḥib al-Dīn al-Khaṭīb (Beirut: Dār al-Maʿrifah, n.d.), Vol. 6, p. 283; ḥadīth number 30102 in Ibn Ḥusām al-Dīn, *Kanz al-'Ummāl*, Vol. 10, p. 206; ḥadīths numbers 18135 and 18136 in al-Bayhaqī, *Sunan al-Bayhaqī*, Vol. 9, p. 133; ḥadīth number 1715 in al-Tirmidhī, *Sunan al-Tirmidhī*, Vol. 4, p. 214; al-ʿAynī, *'Umdah al-Qārī*, Vol. 12, p. 55, Vol. 15, p. 105; al-Hindī, *Aḥkām al-Ḥarb wa al-Salām*, p. 180; Abū al-Wafā, *Al-Naẓariyyah al-'Āmmah*, p. 297; Bilājī, "Sharīʿah al-Ḥarb fī al-Sīrah", p. 124; Alsumaih, "The Sunni Concept of Jihad", p. 125.

[105] Muḥyī al-Dīn ibn Sharaf al-Nawawī, *Sharḥ al-Nawawī 'alā Ṣaḥīh Muslim*, 2nd ed. (Beirut: Dār Iḥyā' al-Turāth al-ʿArabī, 1972/1392), Vol. 12, p. 153; Ibn Ḥajar al-ʿAsqalānī, *Fatḥ al-Bārī*, Vol. 1, p. 352.

[106] See Jean Pascal Zanders, "International Norms against Chemical and Biological Warfare: An Ambiguous Legacy", *Journal of Conflict and Security Law*, Vol. 8, No. 2, 2003, p. 404.

that the greatest part of the area of Islamic international law is a collection of differing and often contradictory judgements reached by individual jurist-scholars.

**4.6 Weapons**

The classical jurists did not devote separate parts of their discussions to the permissibility of particular weapons. Although this may sound, prima facie, as if they were not concerned with the lethal, destructive or indiscriminate nature of some of the weapons, the examination of the Islamic corpus juris proves otherwise. This can be easily understood when their war contexts and the kinds of weapons used at the time are taken into consideration. The study of the *sīrah* and classical juristic Islamic literature indicates that the normal war context of the early period of Islam consisted of warriors using basically swords, lances and arrows[107] and of a war being fought until one party submitted or left the battlefield.

In this specific war context, Muslim jurists are silent on the matter of weapons,[108] mainly here swords and lances because they were solely used against enemy combatants, especially in the light of the prohibition of targeting the specific categories of non-combatants discussed above. In other words, this war context generally refers to one-to-one fighting situations. Concerning the use of arrows, the Mālikī jurists discussed the permissibility of using "poison-tipped arrows".[109] Some jurists prohibited shooting the enemy with poison-tipped arrows, while others merely disliked the idea of it because the enemy could shoot them back at the Muslims and

[107] See Haykal, *Al-Jihād wa al-Qitāl*, Vol. 2, p. 1343.
[108] See Alsumaih, "The Sunni Concept of Jihad", p. 110.
[109] Sohail Hashmi, "Islamic Ethics and Weapons of Mass Destruction: An Argument for Nonproliferation", in Sohail H. Hashmi and Steven P. Lee, eds., *Ethics and Weapons of Mass Destruction: Religious and Secular Perspectives* (Cambridge: Cambridge University Press, 2004), p. 329.

because there was no precedent for this action in the early Islamic period.[110] However, the Ḥanafī jurist al-Shaybānī permitted the use of weapons tipped with poison, fire or oil because they were more effective in defeating the enemy.[111]

In other, i.e., non-one-to-one fighting situations, the jurists discussed the permissibility of using different kinds of weapons including some which are peculiar to their war context. To put it more accurately, the jurists discussed these weapons in the light of the Prophet's war contexts simply because, in accordance with the nature of Islamic law as reflected in the term *siyar*, they were developing rulings to regulate the conduct of war based primarily on the war context of the Prophet's time. These different war situations include cases of sheltering behind human shields and night attack, discussed above. They also discussed specific kinds of weapons in the course of their discussion of the issue of destruction of enemy property, considered below. In other words, their discussion of the weapons used during the conduct of war are specifically linked with, and shaped by, two other issues: namely, first, the likelihood of the indiscriminate killing of non-combatants as collateral damage – usually specifying women and children, and, second, the destruction of enemy property.

In other war contexts that did not consist of one-to-one combat, where the enemy retreats inside fortifications, the Muslim jurists discussed the use of three specific weapons, mainly, directing mangonels or fire at, or flooding, the enemy fortifications. The objective of using such weapons was to ensure the victory of the Muslim army by forcing their enemy to surrender, sometimes even before starting to

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[110] See, for example, Khalīl ibn Isḥāq ibn Musā al-Jundī, *Mukhtaṣar Khalīl fī Fiqh Imām Dār al-Hijrah*, ed. Aḥmad ʿAlī Ḥarakāt (Beirut: Dār al-Fikr, 1994-5/1415), p. 102; al-ʿAbdarī, *Al-Tāj wa al-Iklīl*, Vol. 3, p. 352; al-Dardīr, *Al-Sharḥ al-Kabīr*, Vol. 2, p. 178; Muḥammad ibn Muḥammad ibn ʿAbd al-Raḥman al-Ḥaṭṭāb, *Mawāhib al-Jalīl li-Sharḥ Mukhtaṣar Khalīl*, 2nd ed. (Beirut: Dār al-Fikr, 1977-8/1398), Vol. 3, p. 352; Weeramantry, *Islamic Jurisprudence*, p. 138; Alsumaih, "The Sunni Concept of Jihad", p. 116; Bennoune, "Humanitarian Law in Islamic Jurisprudence", p. 628; Copinger-Symes, "Is Osama bin Laden's '*Fatwa* Urging *Jihad* against Americans' dated 23 February 1998 Justified y Islamic Law?", p. 224.

[111] Al-Shaybānī, *Al-Siyar al-Kabīr*, Vol. 4, p. 1475. See Alsumaih, "The Sunni Concept of Jihad", p. 115.

use such weapons, or by causing a degree of destruction to their fortifications and/or, thus, causing casualties, probably including non-combatants, that would force the enemy to surrender. In the cases of night attack or sheltering behind human shields, the jurists gave the various nuanced and contradictory judgements over the permissibility of shooting mangonels at the enemy as discussed above. Concerning these two cases, there is no precedent to suggest that Muslims were faced with similar situations during the lifetime of the Prophet. But the jurists' discussions were merely attempts to advocate Islamic regulations for the Muslims in these cases.

In the context of the war situations when the enemy retreats or fights from inside fortifications, the majority of the jurists permit targeting the fortifications with mangonels. This is based on the precedent from the last battle the Prophet attended, al-Ṭā'if (8/630), when mangonels were claimed to be used for the first time in the history of Islam. In this battle, the tribe of Thaqīf retreated to their fortress in al-Ṭā'if after their defeat in the battle of Ḥunayn, and collected what they needed for fighting for a whole year. After besieging Thaqīf for about twenty days, Salmān al-Fārisī suggested to the Prophet that they should fire mangonels at them, a weapon Salmān introduced to the Prophet as "we use mangonels in Persia to shoot at [enemy] fortifications."[112] Apparently, the Muslims did not manage to use mangonels at Thaqīf's fortress because the Muslims who attempted to shoot stones from them were stormed with hot iron and arrows, which led to the death of twelve Muslims.[113]

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[112] Muḥammad ibn ʿUmar al-Wāqidī, *Kitāb al-Maghāzī*, ed. Muḥammad ʿAbd al-Qādir ʿAṭā (Beirut: Dār al-Kutub al-ʿIlmiyyah, 2004/1424), Vol. 2, p. 332; al-Shaybānī, *Al-Siyar al-Kabīr*, Vol. 4, p. 1468. See also, Muḥammad al-Muʿtaṣim Billah in Ismāʿīl ibn ʿUmar ibn Kathīr, *Al-Sīrah al-Nabawiyyah* (Beirut: Dār al-Kitāb al-ʿArabī, 1997), Vol. 4, p. 623.

[113] Al-Wāqidī, *Al-Maghāzī*, Vol. 2, pp. 332, 240; Muḥammad ibn Isḥāq, *Al-Sīrah al-Nabawiyyah*, ed. ʿAbd al-Malik ibn Hishām, annotated by Fu'ād ibn ʿAlī Ḥāfiẓ (Beirut: Dār al-Kutub al-ʿIlmiyyah, 2000), Vol. 4, pp. 74-77; A. Guillaume, trans. *The Life of Muhammad: A Translation of Isḥāq's Sīrat Rasūl Allāh* (Oxford: Oxford University Press, 1955), pp. 589-591; Ibn Kathīr, *Al-Sīrah*, Vol. 4, pp. 622 f.; Muḥammad Ḥusayn Haykal, *The Life of Muḥammad*, trans. from the 8th ed. by Ismaʿīl Rāgī A. al-Fārūqī (N.p.: North American Trust Publication, 1976), p. 423; Adil Salahi, *Muhammad Man and*

The Prophet therefore ordered the Muslims to use another “weapon”, i.e., cutting down the grapes of Thaqīf to force them to surrender. After some negotiations, the grapes were not cut down following the request of Thaqīf, and the Prophet ordered the Muslims to retreat and stop the battle.[114]

Concerning the use of fire as a weapon, the jurists give different rulings. Based on the Prophet’s prohibition of burning humans with fire: “do not punish the creatures of God with the punishment of God”,[115] it can be concluded that, as Hashmi aptly states, “the deliberate burning of persons, either to overcome them in the midst of battle or to punish them after capture, is forbidden.”[116] However, directing fire at enemy fortifications was also prohibited by some jurists,[117] including al-Shawkānī, who argued that burning is specifically prohibited,[118] although it was considered merely reprehensible by Ibn ʿAbbās (d. 68/668) and Mālik ibn Anas (d. 179/795).[119] Furthermore, al-Awzāʿī (d. 157/774), Sufyān al-Thawrī (d. 161/778), al-Shaybānī (d. 189/804-5), Ibn Qudāmah (d. 620/1223) and Ibn ʿĀbidīn (d. 1252/1836)

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*Prophet: A Complete Study of the Life of the Prophet of Islam* (Leicester: Islamic Foundation, 2002/1423), p. 659.

[114] Al-Wāqidī, *Al-Maghāzī*, Vol. 2, pp. 332-339; Ibn Isḥāq, *Al-Sīrah*, Vol. 4, pp. 74 f.; Guillaume, *The Life of Muhammad*, pp. 589 f.; Salahi, *Muhammad Man and Prophet*, p. 659; Ṣaqr, *Falsafah al-Ḥarb*, p. 59.

[115] See, for example, ḥadīths numbers 2854 and 6524 in al-Bukhārī, *Al-Jāmiʿ al-Ṣaḥīḥ al-Mukhtaṣar*, Vol. 3, p. 1098, Vol. 6, p. 2537; ḥadīth number 4351 in Abū Dāwūd, *Sunan Abī Dāwūd*, Vol. 4, p. 126; Ibn Fattūḥ al-Ḥumaydī, *Al-Jamʿ bayn al-Ṣaḥīḥayn*, Vol. 2, p. 106; ḥadīth number 1801 in Ibn al-Athīr, *Muʿjam Jāmiʿ al-Uṣūl fī Aḥādīth al-Rasūl*, Vol. 3, p. 481; ḥadīth number 1458 in al-Tirmidhī, *Sunan al-Tirmidhī*, Vol. 4, p. 59; ḥadīths numbers 16597, 16635 and 17841 in al-Bayhaqī, *Sunan al-Bayhaqī*, Vol. 8, pp. 195, 202, Vol. 9, p. 71; al-Shāfiʿī, *Al-Umm*, Vol. 1, p. 257, Vol. 4, p. 245, Vol. 7, p. 182; al-Shaybānī, *Al-Siyar al-Kabīr*, Vol. 4, p. 1469; al-Sarakhsī, *Kitāb al-Mabsūt*, Vol. 26, p. 152; Ibn Ḥazm, *Al-Muḥallā*, Vol. 10, p. 374, Vol. 11, pp. 189 f.; Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 18; al-Shawkānī, *Nayl al-Awṭār*, Vol. 8, pp. 2, 75; al-Māwardī, *Al-Aḥkām al-Sulṭāniyyah*, p. 72; Alsumaih, “The Sunni Concept of Jihad”, p. 112.

[116] Hashmi, “Islamic Ethics and Weapons of Mass Destruction”, p. 328. See also Hashmi, “Islam, Sunni”, p. 219; al-Māwardī states that “burning any of them [the enemy] with fire either dead or alive is impermissible.” Al-Māwardī, *Al-Aḥkām al-Sulṭāniyyah*, p. 72. See also Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 230; Muḥammad ibn ʿAbd Allah al-Zarkashī, *Sharḥ al-Zarkashī ʿalā Mukhtaṣar al-Khiraqī*, ed. ʿAbd al-Munʿim Khalīl Ibrāhīm (Beirut: Dār al-Kutub al-ʿIlmiyyah, 2002/1423), Vol. 3, p. 202; Ṣaqr, *ʾAl-ʿAlāqāt al-Dawliyyah*, p. 59; Mahmassani, “The Principles of International Law in the Light of Islamic Doctrine”, p. 303; Alsumaih, “The Sunni Concept of Jihad”, p. 112 f.; Zawati, *Is Jihad a Just War?*, p. 41.

[117] Al-Qarāfī, *Al-Dhakhīrah*, Vol. 3, pp. 208 f.

[118] Al-Shawkānī, *Al-Sayl al-Jarrār*, Vol. 4, p. 534. See al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, pp. 595 f.

[119] Al-Shawkānī, *Nayl al-Awṭār*, Vol. 8, p. 76.

permitted directing fire at enemy fortifications provided that this was the only way to overcome the enemy[120] and Abū Ḥanīfah, al-Shāfiʿī and al-Kāsānī (d. 587/1191) did not stipulate this condition.[121]

Al-Qarāfī states that it is permitted to direct fire at enemy fortifications if only combatants - not women and children - are inside, though he hastened to state that even in this case it was still prohibited by other jurists.[122] Ibn Rushd adds that some jurists advocate that, if the enemy starts using fire, then Muslims can use it in reciprocity, otherwise it is impermissible.[123] Thus, it should be noted here that the jurists make a distinction between attacking enemy fortifications with mangonels and fire. Moreover, it is worth reaffirming here that mangonels (Arabic *manjanīq*, a word of Persian origin), as defined by the classical jurists, was "a machine for throwing big stones."[124] This signifies that the jurists differentiated between weapons, here stones, which have limited effects and incendiary weapons, here fire, which could lead to unrestricted burning and/or destruction, even if inside specific fortifications. In his time, Ibn Qudāmah permitted using mangonels "because it is commonly used in fighting and, therefore, became similar to the shooting of arrows."[125] To sum up, the classical jurists gave a detailed examination for the use of mangonels and fire which could lead to indiscriminate killings in the different war situations relevant to the ancient and primitive war contexts of their times.

Similarly, using flooding enemy fortifications as a weapon to overcome the enemy or force them to surrender is generally ruled on in the same way as the use of

[120] See, for example, al-Shaybānī, *Al-Siyar al-Kabīr*, Vol. 4, p. 154; Ibn ʿĀbidīn, *Ḥāshiyah Radd al-Muḥtār*, Vol. 4, p. 129; Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 230; Alsumaih, "The Sunni Concept of Jihad", pp. 113 f.
[121] Al-Shāfiʿī, *Al-Umm*, Vol. 4, pp. 243, 257; al-Kāsānī, *Badāiʿ Al-Ṣanāiʿ*, Vol. 7, p. 100; Ṣaqr, *ʿAl-ʿAlāqāt al-Dawliyyah*, p. 65; Alsumaih, "The Sunni Concept of Jihad", p. 113.
[122] Al-Qarāfī, *Al-Dhakhīrah*, Vol. 3, pp. 209 f.
[123] Ibn Rushd, *Bidāyah al-Mujtahid*, Vol. 1, p. 281.
[124] Ibn ʿĀbidīn, *Ḥāshiyah Radd al-Muḥtār*, Vol. 4, p. 129. See also al-Shāfiʿī, *Al-Umm*, Vol. 4, p. 288; al-Nawawī, *Al-Majmūʿ*, Vol. 20, p. 354.
[125] Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 230.

fire. It seems that they likened flooding to fire by resorting to analogy since there is no precedent in the early period of Islam upon which the jurists would have based their rulings. Al-Shaybānī, Ibn al-Humām and Ibn ʿĀbidīn from the Ḥanafī school and Ibn Qudāmah from the Ḥanbalī school stipulate that flooding enemy fortifications is permitted only in case of absolute "military necessity", i.e., "when it is the only way to overcome the enemy."[126] Otherwise, flooding, like using fire, is prohibited because it will lead to casualties among the enemy's women and children which is, al-Shaybānī states, "*ḥarām sharʿā*" (prohibited by sharīʿah).[127] Nevertheless, Abū Ḥanīfah and al-Kāsānī from the Ḥanafī school and al-Shāfiʿī permitted flooding the enemy fortifications without referring to this condition.

Al-Shaybānī adds cutting the water supply to the enemy fortifications as a weapon, or putting blood or "poison in their water *in order to spoil it for them* [emphasis added]",[128] but poisoning the enemy's water in order to kill them is prohibited.[129]Thus, it is of paramount importance to clearly state here that what al-Shaybānī meant is not using these weapons or tactics as weapons of mass destruction but, as he states, in order to overcome them and destroy their power "…*qahrihim wa kasr shawkatihim*".[130] In other words, the objective of using these weapons was to force those inside the fortifications to surrender, not to kill them on a large scale.[131] This explains why the classical jurists did not devote specific discussions to the permissibility of weapons but discussed these ancient weapons in relation to the

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[126] Al-Shaybānī, *Al-Siyar al-Kabīr*, Vol. 4, p. 1554.
[127] Ibid.
[128] Ibid., Vol. 4, p. 1467.
[129] Bedjaoui, "The Gulf War of 1980-1988 and the Islamic Conception of International Law", p. 291.
[130] Al-Shaybānī, *Al-Siyar al-Kabīr*, Vol. 4, p. 1467. Al-Māwardī also permits flooding the enemy and cutting their water supply in order to weaken them and, thus, overcome them or force them to conclude a peace accord. Al-Māwardī, *Al-Aḥkām al-Sulṭāniyyah*, p. 72
[131] On the point that the goal of cutting the water supply is forcing the enemy to surrender, see al-Hindī, *Aḥkām al-Ḥarb wa al-Salām*, p. 195.

destruction of enemy property. It is therefore crucial that these juristic rulings are understood in their war contexts and according to the intentions of the jurists.

The most important issue concerning the Islamic *jus in bello* in modern war contexts that has not been adequately studied by modern Muslim scholars is the use of weapons of mass destruction (WMD).[132] Among the reasons for the inadequacy of such studies by scholars of Islamic law are first, that the Muslim world has not been afflicted with the massive scale of human catastrophe as a result of the use of weapons, especially WMD, that has been experienced in Europe and certain parts of Asia in the twentieth century. Undoubtedly, the experience of tragedies on this scale has created a cultural and popular awareness of the danger of WMD, and specifically nuclear weapons, especially in Europe, Japan, the USA and obviously among the Jewish people, incomparably greater than in the Muslim world.

Second, and more importantly, the considerable westernization of the legal systems, except family law, of most Muslim countries has largely alienated scholars of Islamic law from contributing to the policies and positions of their governments, most noticeably on two of the areas treated by their classical predecessors, i.e., Islamic governance and Islamic international law. If scholars of Islamic law, like the many institutions in the dictatorships of most Muslim countries, were involved in shaping policy, greater contributions representative of Islamic law inevitably would have been made. More importantly, such contributions would be the criteria against which the practices of Muslim countries could be judged Islamically and some of the violations of international humanitarian law committed by Muslims could be prevented. It should be pointed out that confusing recent practices of individual

[132] Sohail H. Hashmi, "Interpreting the Islamic Ethics of War and Peace", in Sohail H. Hashmi ed., *Islamic Political Ethics: Civil Society, Pluralism, and Conflict* (Princeton: Princeton University Press, 2002), p. 213.

Muslim dictators with the positions of Islamic law is a mistake common in the writings of some Western specialists on the tradition of war in Islam.[133]

In short, contemporary Islamic positions on WMD can be divided generally into three main attitudes. First, there are those who totally prohibit the acquisition and use of WMD because such weapons lead to the killing of non-combatants and inflict unnecessary destruction.[134] Second, relying on the principle of reciprocity similarly utilized by the classical jurists with regard to primitive weapons, there are those who affirm the Islamic prohibition of WMD, on the above grounds, but argue that Muslims may possess/use any weapon, including nuclear weapons, only if their enemies posses/use them.[135] Some Qur'ānic pronouncements are quoted in support of this position such as "whoso commits aggression against you, then respond within the same degree of aggression waged against you"[136] and "if you punish, then punish with the same punishment which had been inflicted upon you."[137] Mohamed Mokbel Mahmud Elbakry and a certain Ibrāhīm ʿAbd al-Ḥamīd argue here that if Muslims abstain from using a weapon which is used by their enemies, it would be "tantamount to committing suicide", which is prohibited according to the Qur'ān: "do not throw

[133] Troy S. Thomas rightly points out that "Despite its humanity; *siyar* does suffer to the extent that it is abused by authoritarian regimes purporting to be guided by Islam and its laws. Regimes claiming Islamic legitimacy are often the most grievous violators of *siyar*." Troy S. Thomas, "Prisoners of War in Islam: A Legal Inquiry", *The Muslim World*, Vol. LXXXVII, No. 1, January, 1997, p. 53.
[134] Ibrāhīm Yaḥyā al-Shihābī, *Mafhūm al-Ḥarb wa al-Salām fī al-Islām: Ṣirāʿāt wa Ḥurūb 'am Tafāʿul wa Salām?* (N.p.: Manshūrāt Mu'assasah Maī, 1990/1399), p. 76; MuḥammadʿArafah, *Al-Khaṭar al-Nawawī fī Mirāh ʿĀlim ʿĀzharī*, supplement to *Majalah al-Azhar*, June 2004/Rabīʿ al-Ākhir 1425; Shmuel Bar, *Warrant for Terror: Fatwās of Radical Islam and the Duty of Jihād* (Lanham, MD: Rowman & Littlefield, 2006), p. 72.
[135] See, for example, Abū Zahrah, *Al-ʿAlāqāt al-Dawliyyah fī al-Islām*, p. 102; Aḥmad Ghunaym, *Al-Jihād al-Islāmī: Dirāsah ʿIlmiyyah fī Nuṣūṣ al-Qur'ān wa Ṣiḥāḥ al-Ḥadīth wa Wathā'iq al-Tārīkh* (Cairo: Dār al-Ḥammamī, 1975/1394), p. 80; ʿAbd al-ʿAzīz al-Khayyāṭ, "Al-Islām Dīn al-Salām: Mafhūm al-Ḥarb wa al-Salām fī al-Islām", *Islam and the 21st Century*, Researches and Facts, the Tenth General Conference of the Supreme Council for Islamic Affairs (Cairo: Supreme Council for Islamic Affairs, 1999/1420), pp. 334 f. Al-Khayyāt is a former Minister of Religious Endowments in Jordan. See also Hashmi, "Interpreting the Islamic Ethics of War and Peace", pp. 213 f.; Bar, *Warrant for Terror*, pp. 70 f.; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, pp. 591, 602 f., 726.
[136] Qur'ān 2:194.
[137] Qur'ān 16:126.

yourselves into destruction".[138] Moreover, the following advice of Abū Bakr to Khālid ibn al-Walīd is quoted in support of this attitude: "If you encounter your enemy, then fight them with the same weapon they fight you with".[139] Third, there are those who also acknowledge the Islamic prohibition of the use of WMD, but argue that Muslims can use these weapons even before their enemies use them because some countries stockpile such weapons and use them at will, despite the fact that they have signed treaties banning the use of such weapons.[140]

Thus, modern Muslim scholars, like their predecessors, weigh the constraints on the use of weapons of indiscriminate effect against the necessity of winning the war. Despite their different war contexts, the overarching factor for both classical and modern Muslim scholars in determining whether Muslims are permitted to possess or use any weapon of indiscriminate effect, including WMD, is whether their enemies possess or use it. To conclude, the majority of classical and modern Muslim scholars have tended to override the Islamic restrictions on the use of weapons that lead to indiscriminate killing if their enemies use them, justifying their position by the Islamic principle of reciprocity.

### 4.7 Property Destruction

The classical jurists laid considerable emphasis on the issue of the destruction of enemy property during the course of fighting. Their discussion of this issue also typifies the nature of Islamic law, in terms of the bases upon which they advocated their rulings and the host of different, sometimes contradictory, rulings generated as a result. The jurists based their discussion of this issue upon two conflicting

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[138] Qur'ān 2:195.

[139] Elbakry, "The Legality of 'War' in Al-Shariʿa Al-Islamiya", p. 320; ʿĀrif Khalīl Abū ʿĪd, *Al-ʿAlāqāt al-Khārijyyah fī Dawlah al-Khilāfah*, 2nd ed. (Birmingham: Dar Arqam, 1990), p. 192; Abū ʿĪd, *Al-ʿAlāqāt al-Dawliyyah fī al-Fiqh al-Islāmī*, pp. 178 f.

[140] Haykal, *Al-Jihād wa al-Qitāl*, Vol. 2, pp. 1353 f.

incidents: the first was the Prophet’s order for the Muslims to cut down the palm trees of the tribe of Banū al-Naḍīr in 4/625 and the Qur’ānic reference to this incident (Qur’ān 59:5). The Prophet gave this order to force Naḍīr to surrender during a bloodless siege that lasted for six nights and ended without fighting. The second incident upon which the jurists based their discussion is Abū Bakr’s ten commands to his army commander, which included: “do not cut down fruit-bearing trees; do not destroy buildings; do not slaughter a sheep or a camel except for food; do not burn or drown palm trees”.[141]

Faced with these two conflicting incidents, the jurists were divided into two groups, each with its own way of interpreting or reconciling this contradiction. According to the first group, al-Awzāʿī, Abū Thawr, al-Layth ibn Saʿd and al-Thawrī, it is prohibited for the Muslim army to inflict destruction on enemy property. Al-Awzāʿī reconciled the contradiction by arguing that Abū Bakr gave these commands based on his knowledge that the Prophet’s order to cut down the palm trees of Banū al-Naḍīr, was later abrogated. Abū Bakr would not have given any commands contrary to the Prophet’s practice because he was the most knowledgeable about the Prophet’s practice and the interpretation of the Qur’ān. Moreover, al-Awzāʿī states that Muslim leaders have followed Abū Bakr’s prohibition and the Muslim leaders have accepted them.[142]

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[141] See, for example, ḥadīth number 965 in Ibn Mālik, *Muwaṭṭa’*, Vol. 2, p. 447; ḥadīths numbers 17904, 17927 and 17929 in al-Bayhaqī, *Sunan al-Bayhaqī*, Vol. 9, pp. 85, 89, 90; Bennoune, “Humanitarian Law in Islamic Jurisprudence”, p. 626; M. Cherif Bassiouni, ed., *A Manual on International Humanitarian Law and Arms Control Agreements* (New York: Transnational Publishers, 2000), p. 9.

[142] Abū Yūsuf Yaʿqūb ibn Ibrāhīm al-Anṣārī, *Al-Radd ʿalā Siyar al-Awzāʿī*, ed. Abū al-Wafā al-Afghānī (Beirut: Dār al-Kutub al-ʿIlmiyyah, n.d.), p. 85; Muḥammad ibn Aḥmad ibn Muḥammad ibn Rushd, *The Distinguished Jurist’s Primer: Bidāyah al-Mujtahid*, trans. Imran Ahsan Khan Nyazee, reviewed by Mohammad Abdul Rauf (Reading: Garnet, reprint 2002), Vol. 1, p. 461; al-Ṭabarī, *Ikhtilāf al-Fuqahā’*, p. 103; Ṣaqr, *ʿAl-ʿAlāqāt al-Dawliyyah*, pp. 64-69; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, p. 594; Khadduri, *War and Peace*, p. 103.

However, according to the second group, the majority of the jurists including Abū Ḥanīfah, Abū Yūsuf, al-Shaybānī, al-Shāfiʿī, Mālik, and Ibn Ḥazm, it is permissible to cause destruction to enemy property during the course of fighting. Abū Yūsuf, al-Shāfiʿī, and the Mālikī jurists reconciled the contradiction by arguing that Abū Bakr gave these commands prohibiting the destruction of enemy property because he, they allege, knew that the Muslims would win the battle and so he did not want to damage enemy property because he hoped it would be spoils for the Muslims.[143] Nevertheless, Ibn Ḥazm accepts Abū Bakr's prohibition but argues that following this prohibition is optional and, for him, both permitting and prohibiting the destruction of property are acceptable.[144]

It is worth adding here that al-Shāfiʿī and Ibn Ḥazm distinguish between lifeless property and animate creatures owned by the enemy. Both al-Shāfiʿī and Ibn Ḥazm maintain that it is equally permissible either to inflict damage on enemy property or to avoid causing damage because, although the Prophet ordered the Muslims to cut down the palm trees during the siege of Banū al-Naḍīr, he did not resort to this tactic on other occasions.[145] Al-Shāfiʿī, however, prefers that the Muslim army inflict damage on the lifeless property of the enemy only when the enemy is powerful and cannot be overcome because of the strength of their fortifications, so that Muslims cannot reach a settlement with them by either annexing them to the *dār al-Islām* (Islamic state) or concluding a peace accord with them, i.e., making them part of the *dār al-ʿahd*.[146]

With regard to living creatures such as horses, cows, bees, etc., it is prohibited to cause any damage to them except in cases of military necessity or if

[143] Abū Yūsuf, *Al-Radd*, pp. 86 f.; al-Shāfiʿī, *Al-Umm*, Vol. 4, p. 258; al-Ṣanaʿānī, *Subul al-Salām*, Vol. 4, pp. 51 f.; Ṣaqr, *Al-ʿAlāqāt al-Dawliyyah*, pp. 63 f.
[144] Ibn Ḥazm, *Al-Muḥallā*, Vol. 7, p. 294.
[145] Al-Shāfiʿī, *Al-Umm*, Vol. 4, p. 257; Ibn Ḥazm, *Al-Muḥallā*, Vol. 7, p. 294.
[146] Al-Shāfiʿī, *Al-Umm*, Vol. 4, p. 257.

they are slaughtered for food. Al-Shāfiʿī justifies this prohibition of inflicting damage on living creatures by arguing that, unlike lifeless property, living creatures feel pain and any harm done to them will be unjustifiable torture.[147] Al-Shāfiʿī and Ibn Ḥazm based their distinction between lifeless property and living creatures on the Prophet's ḥadīth which states that "Whosoever kills a sparrow or any other creature bigger in size, will be questioned for this act by God."[148] However, the majority of the jurists agree that it is permitted to kill horses or other animals when the enemy warriors are fighting while riding them.[149] This is because the horse in this case is used as military equipment. Additionally, Ibn Ḥazm and Ibn Qudāmah permitted the killing of pigs, because according to Ibn Qudāmah, pigs are "harmful and useless."[150]

The jurists agree that it is prohibited to drown or burn the enemy's bees on the basis of a ḥadīth of the Prophet's narrated by Ibn ʿAbbās.[151] Ibn Qudāmah states that killing the bees or any other animal, except for food or if the enemy are using it for fighting, will be tantamount to the crime described in the Qur'ān as causing destruction on the earth (Qur'ān 2:205). Additionally, Ibn Qudāmah here agrees with

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[147] Ibid., Vol. 4, pp. 259, 287.
[148] Aḥmad ibn ʿAlī ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb* (Beirut: Dār al-Fikr, 1984/ 1404), Vol. 3, p. 133; al-Shāfiʿī, *Al-Umm*, Vol. 4, pp. 244, 259, 287, Vol. 7, pp. 299, 355; al-Suyūṭī, *Jāmiʿ al-Aḥādīth*, Vol. 7, p. 79, Vol. 10, p. 752; see ḥadīths numbers 17907 and 18912 in al-Bayhaqī, *Sunan Al-Bayhaqī*, Vol. 9, p. 86, Vol. 9, p. 279; ḥadīths number 4534 and 4535 in al-Nasā'ī, *Sunan al-Nasā'ī al-Kubrā*, Vol. 3, p. 73; ʿAlī ibn Muḥammad ibn Ḥabīb al-Māwardī, *Al-Ḥāwī al-Kabīr: Fī Fiqh Madhhab al-Imām al-Shāfiʿī Raḍī Allah ʿanh wa huwa Sharḥ Mukhtaṣar al-Muznī*, ed. ʿAlī Muḥammad Muʿawwaḍ and ʿĀdil Aḥmad ʿAbd al-Mawjūd (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1999), Vol. 14, p. 190; al-Shawkānī, *Nayl al-Awṭār*, Vol. 8, p. 259, Vol. 9, pp. 13 f.; al-Shawkānī, *Al-Sayl al-Jarrār*, Vol. 4, p. 380.
[149] See, for example, al-Shāfiʿī, *Al-Umm*, Vol. 4, p. 259; Ibn Ḥazm, *Al-Muḥallā*, Vol. 7, p. 294; al-Māwardī, *Al-Aḥkām al-Sulṭāniyyah*, pp. 57 f.; al-Ghazālī, *Al-Waṣīt*, Vol. 7, p. 31; al-Nawawī, *Al-Majmūʿ*, Vol. 21, pp. 60, 65; Ibn Qudāmah, *Al-Kāfī*, Vol. 4, p. 126; Ibn Mufliḥ, *Al-Furūʿ*, Vol. 6, p. 196; Zakariyyā ibn Muḥammad ibn Aḥmad ibn Zakariyyā al-Anṣārī, *Fatḥ al-Wahhāb bi-Sharḥ Manhaj al-Ṭullāb* (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1997-8/1418), Vol. 2, p. 301; Mahmassani, *Al-Qānūn wa al-ʿAlāqāt*, p. 261.
[150] Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 225; Ibn Qudāmah, *Al-Kāfī*, Vol. 4, p. 138; Ibn Ḥazm, *Al-Muḥallā*, Vol. 7, p. 294.
[151] Muḥammad ibn Ṭāhir ibn al-Qaysarānī, *Dhakhīrah al-Ḥuffāẓ*, ed. ʿAbd al-Raḥman al-Furaywā'ī (Riyadh: Dār al-Salaf, 1996/1416), Vol. 2, p. 906; Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 232; Ibn Qudāmah, *Al-Kāfī*, Vol. 4, p. 126.

al-Shāfiʿī that bees are animate creatures and thus cannot be killed.[152] However, the jurists allowed taking some of the honey but disagreed over taking all of it because this could lead to the death and destruction of the bees.[153]

Concerning the permissibility of inflicting damage on lifeless property during the conduct of war, the jurists discussed mainly the destruction of enemy crops, trees and buildings. They also discussed the permissibility for the army to eat and feed their animals from the enemy's resources. The jurists' discussion of all these different kinds of property generates a host of different rulings based on various rationales and, therefore, conflicting details about which of these properties can be destroyed and when. As for the destruction of buildings and cutting down crops and trees, al-Awzāʿī, Abū Thawr, al-Layth ibn Saʿd and al-Thawrī prohibited it on the basis of Abū Bakr's commands discussed above. Abū Ḥanīfah, Abū Yūsuf, Mālik, and Ibn Ḥazm permitted cutting down and burning trees, despite Abū Bakr's command, for the reason given above.[154]

The majority of jurists, however, permitted this sort of destruction provided that it was dictated by military necessities, for example, if the trees prevent the army from conducting military operations or if the enemy are taking shelter behind them, especially inside fortifications. Ibn Qudāmah adds that the Muslim army can resort to this sort of destruction in reciprocity.[155] Here the jurists voice their rationale in

[152] Al-Shāfiʿī, *Al-Umm*, Vol. 4, p. 287; Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 232; Ibn Qudāmah, *Al-Kāfī*, Vol. 4, p. 126.
[153] Ibn Qudāmah, *Al-Kāfī*, Vol. 4, p. 126.
[154] Abū Yūsuf, *Al-Radd*, pp. 85 f.; Ibn Ḥazm, *Al-Muḥallā*, Vol. 7, p. 294; Ibn Rushd, *The Distinguished Jurist's Primer*, Vol. 1, p. 461.
[155] Ibn Qudāmah, *Al-Mughnī*, Vol. 9, pp. 233 f.; Ibn Qudāmah, *Al-Kāfī*, Vol. 4, p. 126.

different terms such as public interest,[156] military "necessity",[157] weakening the enemy[158] or, in other words they all mean, winning the war.[159]

Concerning food and fodder, the jurists agree that it is permitted for the Muslim army to eat and give fodder to their animals from the enemy territories, but "only the necessary quantities."[160] However, al-Zuhrī states that this permission is still conditional upon the Muslim commander's approval.[161] This permission is justified by military necessity because of the impossibility of buying food and fodder from the enemy. The risk of doing otherwise would be very harmful for the Muslim army.[162]

Judge Mohammed Bedjaoui, ex-Member of the International Court of Justice, indicates that, under Islamic law, all religious sites are immune from attack.[163] Interestingly, few jurists have considered the question of what a Muslim army should do with the enemy's books and wine if they were found among the spoils. According to the Shāfiʿī jurists and Ibn Qudāmah, if a Muslim army finds books that contain statements of unbelief in God, they should be destroyed. Regarding the Torah and the Bible, if their leather or paper cannot be used, they are to be destroyed but not

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[156] Al-Ghazālī, *Al-Waṣīt*, Vol. 7, p. 31; al-Shawkānī, *Nayl al-Awṭār*, Vol. 8, p. 74.
[157] Al-Shirāzī, *Al-Muhadhdhab*, Vol. 3, p. 279.
[158] Muḥammad ibn Abī Bakr ibn Qayyim al-Jawziyyah, *Jāmiʿ al-Fiqh*, ed. Yusrī al-Sayyid Muḥammad (Al-Manṣūrah: Dār al-Wafā', 2000/1421), Vol. 4, p. 97; al-Māwardī, *Al-Aḥkām al-Sulṭāniyyah*, p. 71.
[159] Al-Nawawī, *Al-Majmūʿ*, Vol. 21, pp. 60 f.
[160] Al-Nawawī, *Al-Majmūʿ*, Vol. 21, p. 109; al-Shawkānī, *Nayl al-Awṭār*, Vol. 8, p. 131; al-Zarkashī, *Sharḥ al-Zarkashī*, Vol. 3, p. 198.
[161] Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 223; al-Shawkānī, *Nayl al-Awṭār*, Vol. 8, p. 131; al-Zarkashī, *Sharḥ al-Zarkashī*, Vol. 3, p. 198.
[162] Ibn Qudāmah, *Al-Mughnī*, Vol. 9, pp. 223 f.; Ibn Qudāmah, *Al-Kāfī*, Vol. 4, p. 136; al-Samarqandī, *Tuḥfah al-Fuqahā'*, Vol. 3, pp. 299 f.; ʿAbd Allah ibn Maḥmūd ibn Mawdūd, *Al-Ikhtiyār li-Taʿlīl al-Mukhtār*, ed. ʿAbd al-Laṭīf Muḥammad ʿAbd al-Raḥman, 3rd ed. (Beirut: Dār al-Kutub al-ʿIlmiyyah, 2005/1426), Vol. 4, p. 136; al-Zarkashī, *Sharḥ al-Zarkashī*, Vol. 3, p. 198. See generally on the permissibility of food and fodder from the enemy territories, al-Shāfiʿī, *Al-Umm*, Vol. 4, pp. 262, 264; al-Shaybānī, *Al-Siyar*, p. 108; al-Nawawī, *Al-Majmūʿ*, Vol. 21, pp. 109 f.; Ibn Qayyim al-Jawziyyah, *Jāmiʿ al-Fiqh*, Vol. 4, pp. 36 f.; al-Shawkānī, *Nayl al-Awṭār*, Vol. 8, p. 131; Ibn ʿAbd al-Barr, *Al-Kāfī fī Fiqh Ahl al-Madīnah*, pp. 211 f.; Mahmassani, "The Principles of International Law in the Light of Islamic Doctrine", p. 315.
[163] Bedjaoui, "The Gulf War of 1980-1988 and the Islamic Conception of International Law", p. 289.

burned.[164] However, according to al-Shāfiʿī and Ibn Qudāmah, books that contain useful knowledge, such as medicine, language or poetry, etc., should be made use of.[165] All in all, al-Shāfiʿī and Ibn Qudāmah's positions on books contradict the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict.[166] As for wine, it should be poured away and, if the Muslims cannot make use of the wine containers, they should be also destroyed.[167]

It is worth noting here that the jurists' discussion of the permissibility of inflicting damage specifically on pigs, books and wine are entirely based on the jurists' discretion. That is to say, their discussion is not based on Qur'ānic references or precedents set by the Prophet. Therefore, a clear distinction should be made between the jurists' rulings based on Islamic sources and the rulings based on their personal opinions. The significance of making this distinction is that it indicates that a large part of Islamic law is inevitably changeable because Muslim jurists have always developed different rulings based on their interpretations and contextualization of the texts compared with the ever changing contexts that have surrounded jurists throughout history. That is because all the laws advocated by Muslim jurists, no matter how contradictory some of them are, and upon whatever bases or rationales such laws are founded, are called Islamic laws.

### 4.8 Quarter and Safe Conduct

*Amān* (lit. protection, safety) forms an essential part of the Islamic law of war, but the significance of *amān* in explaining both the Islamic *jus ad bellum* and the Islamic

[164] Al-Shāfiʿī, *Al-Umm*, Vol. 4, p. 263; al-Nawawī, *Al-Majmūʿ*, Vol. 21, p. 110; al-Ghazālī, *Al-Waṣīt*, Vol. 7, p. 31; Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 225; Ibn Qudāmah, *Al-Kāfī*, Vol. 4, p. 138; al-Shirāzī, *Al-Muhadhdhab*, Vol. 3, p. 290.
[165] Al-Shāfiʿī, *Al-Umm*, Vol. 4, p. 263; Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 225.
[166] Text available online from http://www.icomos.org/hague/; Internet; accessed 28 March 2009. See also Patwari, *Principles of International Humanitarian Law*, pp. 77 f.
[167] Ibn Qudāmah, *Al-Mughnī*, Vol. 9, pp. 225 f.; Ibn Qudāmah, *Al-Kāfī*, Vol. 4, p. 138; al-Shirāzī, *Al-Muhadhdhab*, Vol. 3, p. 290.

*jus in bello* remains almost unexamined in the Western literature. Moreover, it has been argued that the concept of *amān* influenced the medieval European concept of safe-conduct.[168] *Amān* can be defined as a contract for the protection for the persons and property of enemy belligerents or any other citizen of an enemy state.[169] Its objective, according to the words of some jurists, is *ḥaqn al-dam*[170] (prevention of bloodshed, protection of life). Thus *amān*, as noted by Peters, describes two forms: quarter and safe conduct.[171]

Quarter can be defined as a contract of protection, granted during the actual acts of war, to cover the person and property of an enemy belligerent, all of a regiment, everyone inside a fortification, the entire enemy army or city.[172] This form of *amān* resembles the *hors de combat* status, defined in Article 41 of the Additional Protocol I, 8 June 1977, of the Geneva Conventions in two aspects: first, this form of *amān* indicates that the persons granted this protection have become safe and thus no acts of hostilities can be undertaken against them. Second, it indicates that they are under the protection of the Islamic state. Surprisingly, unlike the *hors de combat* status referred to above, the classical jurists always describe this form of *amān* granted to enemy belligerents as initiated voluntarily by the Muslims and thus they rarely refer to situations when the enemy belligerents request the status of *amān*. They do discuss, however, the situation in which the enemy give up their arms in order to resolve the conflict through arbitration. This quarter is granted during war

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[168] According to John Wansbrough, G.P. Bognetti argues that the development of the medieval European safe-conduct "must have owed a good deal to Islamic law." John Wansbrough, "The Safe-Conduct in Muslim Chancery Practice", *Bulletin of the School of Oriental and African Studies*, Vol. 34, No. 1, 1971, p. 34.

[169] See Faṭānī, *Ikhtilāf al-Dārīn*, p. 127.

[170] Muḥammad al-Khaṭīb al-Shirbīnī, *Mughnī al-Muḥtāj ilā Maʿrifah Maʿānī Alfāẓ al-Minhāj* (Beirut: Dār al-Fikr, n.d.), Vol. 4, p. 237; al-Ramlī, *Nihāyah al-Muḥtāj*, Vol. 8, p. 80. See also Aḥmad al-Ṣāwī, *Bulghah al-Sālik li-Aqrab al-Masālik*, ed. Muḥammad ʿAbd al-Salām Shāhīn (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1995/1414), Vol. 2, p. 185.

[171] Rudolph Peters, *Islam and Colonialism: The Doctrine of Jihad in Modern History* (The Hague: Mouton, 1979), p. 29.

[172] See Ṣaqr, *ʿAl-ʿAlāqāt al-Dawliyyah*, p. 78; Peters, *Islam and Colonialism*, p. 29.

operations in the battlefield. It lasts until the enemy belligerents are escorted to their place of safety, or until the expiration of its fixed duration.

Safe conduct is a contract of protection granted to any non-Muslim citizen of a country that is technically in a state of war with the Islamic state, though not necessarily in the process of undertaking hostile action. This form of protection is given to any individual who desires to enter the Islamic state for business, education, tourism or any other purpose, other than conducting military acts inside the Islamic state or spying.

Some contemporary Muslim scholars have likened this safe conduct status to the "passport" system.[173] Indeed, this ancient safe conduct system is similar to the visa system in some respects. It is a temporary permission to stay in a foreign country and can be renewed after its expiry date.[174] Moreover, because a safe conduct is a temporary residence permit, its holder is exempt from taxes, unless he decides to reside permanently in the Islamic state. It is worth adding here that, despite the fact that these two forms of protection, quarter and safe conduct, address largely different situations, the jurists discussed both forms under the heading *amān*. In other words, they did not distinguish between these two forms and thus the rules advocated by the jurists apply to both. For this reason, the Arabic word *amān* will be used hereafter to refer to both quarter and safe conduct. In addition, the Arabic word *musta'min* will be used to refer to the person who is granted quarter or safe conduct.

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[173] Mahmassani, "The Principles of International Law in the Light of Islamic Doctrine", p. 255; Mahmassani, *Al-Qānūn wa al-ʿAlāqāt*, p. 94; Khadduri, *War and Peace*, p. 169; Hasan Moinuddin, *The Charter of the Islamic Conference and Legal Framework of Economic Co-operation among its Member States: A Study of the Charter, the General Agreement for Economic, Technical and Commercial Co-operation and the Agreement for Promotion, protection and Guarantee of Investments among States of the OIC* (Oxford: Clarendon Press, 1987), p. 57.

[174] See al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, p. 269; Abū Zahrah, *Al-ʿAlāqāt al-Dawliyyah fī al-Islām*, p. 68; Mahmassani, *Al-Qānūn wa al-ʿAlāqāt*, p. 94; Faṭānī, *Ikhtilāf al-Dārīn*, p. 130; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 2, p. 829.

The *amān* system is based on both the Qur’ān and the Sunnah of the Prophet. According to the Qur’ān: “And if anyone of the polytheists seeks your protection, then protect him until he hears the word of God. Then, afterwards, escort him to his place of safety.”[175] Several instances indicate that the Prophet gave *amān* to individuals upon the request of some Muslims. The Prophet granted a specific *amān* to Abū Sufyān and a general *amān* to everyone in Mecca (amnesty)[176] who would not take up arms against the Muslims on their return to Mecca, in what is known as the conquest of Mecca (8/630). These examples of *amān*, granted here before encountering the enemy, signify that those who are granted this status would not be targeted unless they initiated aggression. Thus, in one sense *amān* in this case also indicates a “general amnesty”[177] granted to the enemy.

### 4.8.2 Who can grant *Amān*?

The jurists distinguish between two kinds of *amān*: the general *amān* and the specific *amān*. The general *amān* is granted by the Muslim head of state or his representative to the entire population of a region or a country. The specific *amān* is granted by any Muslim to an individual, or any group of, for example, ten or one hundred, or to everyone inside a fortification or to anyone accompanying a caravan. Thus, unlike the Muslim head of state, an ordinary Muslim individual cannot grant *amān* to the entire population of a city.[178] The jurists generally agree that any adult, sane Muslim is entitled to grant *amān*. They are unanimous that a woman is entitled to the right to

[175] Qur’ān 9:6.

[176] Charis Waddy, *The Muslim Mind*, 3rd ed. (London: Grosvenor, 1990), p. 101.

[177] Bennoune, “Humanitarian Law in Islamic Jurisprudence”, p. 629.

[178] Al-Nawawī, *Al-Majmūʽ*, Vol. 21, pp. 67-70; Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 196; Ibn Qudāmah, *Al-Kāfī*, Vol. 4, p. 162; al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, p. 225; Mahmassani, *Al-Qānūn wa al-ʽAlāqāt*, pp. 94 f.; Zīdān, *Aḥkām al-Dhimmiyyīn*, pp. 47-52; Ṣaqr, *Al-ʽAlāqāt al-Dawliyyah*, p. 84; al-Ṣaqqār, “Niẓām al-Amān”, p. 85; Ann K.S. Lambton, *State and Government in Medieval Islam: An Introduction to the Study of Islamic Political Theory: The Jurists*, London Oriental Series, Vol. 36 (Oxford: Oxford University Press, 1981), p. 202.

give *amān*, apart from Ibn al-Mājishūn, who argued that the validity of *amān* granted by a woman is conditional upon the approval of the Muslim head of state.[179] It is worth adding here that the Mālikī jurists Ibn al-Mājishūn and Ibn Ḥabīb maintain that the *amān* granted by any Muslim must be approved by the Muslim head of state.[180]

Concerning the entitlement of non-Muslims to grant *amān*, the jurists are unanimous that non-Muslim citizens of a foreign country are, obviously, not entitled to grant *amān*, but they disagreed over the validity of *dhimmis* granting *amān* to enemy belligerents during the conduct of war. The majority of the jurists advocate that *dhimmis* are not entitled to grant *amān,*[181] though al-Awzāʿī maintained that the validity of their *amān* is conditional upon the approval of the Muslim head of state.[182] However, al-Qarāfī points out that some jurists do validate *amān* granted by *dhimmis*.[183]

The jurists agree that a slave is entitled to grant *amān* unconditionally, though Abū Ḥanīfah stipulates that the *amān* of a slave is valid only if he fights with the army.[184] According to Abū Zahrah, Abū Ḥanīfah changed his opinion and approved the *amān* of slaves unconditionally[185] when he knew that the second caliph ʿUmar

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[179] Al-Shawkānī, *Nayl al-Awṭār*, Vol. 8, p. 181.
[180] Al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, p. 228; Ṣaqr, *Al-ʿAlāqāt al-Dawliyyah*, p. 84; Zīdān, *Aḥkām al-Dhimmiyyīn*, p. 49.
[181] See, for example, al-Shāfiʿī, *Al-Umm*, Vol. 4, p. 284; al-Shaybānī, *Al-Siyar al-Kabīr*, Vol. 1, p. 257; al-Shaybānī, *Al-Siyar*, p. 143; Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 196; Ibn Qudāmah, *Al-Kāfī*, Vol. 4, p. 161; Ibn ʿAbd al-Barr, *Al-Kāfī fī Fiqh Ahl al-Madīnah*, p. 209; Ṣaqr, *ʿAl-ʿAlāqāt al-Dawliyyah*, pp. 82 f.
[182] Al-Shawkānī, *Nayl al-Awṭār*, Vol. 8, p. 181.
[183] Al-Qarāfī, *Al-Dhakhīrah*, Vol. 3, p. 445. See also Zīdān, *Aḥkām al-Dhimmiyyin*, pp. 47 f.
[184] Al-Shāfiʿī, *Al-Umm*, Vol. 4, p. 284; al-Shaybānī, *Al-Siyar al-Kabīr*, Vol. 1, p. 255; al-Shaybānī, *Al-Siyar*, p. 143; Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 195; al-Shawkānī, *Nayl al-Awṭār*, Vol. 8, p. 181; al-Shirbīnī, *Mughnī al-Muḥtāj*, Vol. 4, p. 237; al-Ghazālī, *Al-Waṣīt*, Vol. 7, p. 43; al-Ghazālī, *Al-Wajīz*, Vol. 2, p. 194; al-Shirbīnī, *Mughnī al-Muḥtāj*, Vol. 4, p. 237; Mahmassani, *Al-Qānūn wa al-ʿAlāqāt*, p. 95; Majid Khadduri, *The Law of War and Peace in Islam: A Study in Muslim International Law* (London: Luzac & Co., 1940), p. 79; Khadduri, *War and Peace*, p. 164; Peters, *Islam and Colonialism*, p. 30.
[185] Muḥammad Abū Zahrah, "Naẓariyyat al-Ḥarb fī al-Islām", *Al-Majallah al-Miṣriyyah lil-Qānūn al-Dawlī*, 1958, p. 42; quoted in al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, p. 237.

ibn al-Khaṭṭāb (r. 634/644), accepted the *amān* granted by a slave to all the enemy inside a fortification.[186]

Concerning the validity of *amān* granted by children, unlike the majority of the jurists, who stipulated that the child must be of age, al-Awzāʿī validates the *amān* of a child who has reached the age of ten while other jurists disagreed over the validity of *amān* granted by a child who has reached the age of discernment.[187] Al-Shaybānī argued that since the conversion of a discerning child to Islam is valid, his/her *amān* is therefore valid too.[188]

The jurists disagreed over the validity of the *amān* granted by a Muslim prisoner of war to his captors or a Muslim trader during his sojourn in an enemy state or a resident of the enemy state who converts to Islam. The majority of the jurists maintain that in these cases Muslims are not entitled to grant *amān* to their captors. Like any other contract concluded under duress, the *amān* in any of these cases is null and void.[189] However, some jurists disagreed about the validity of *amān* granted by Muslim prisoners of war who are inside enemy territory but not particularly under direct duress.[190] It worth adding here that in a case where an enemy enters the Islamic state with an *amān* granted by someone who is not entitled to grant it, or in other words with an invalid *amān*, al-Shāfiʿī indicates that the enemy will be

[186] See al-Shaybānī, *Al-Siyar*, p. 143; Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 196.
[187] Khadduri, *War and Peace*, p. 165; Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 196; Ibn Qudāmah, *Al-Kāfī*, Vol. 4, p. 161; al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, pp. 237-239; Peters, *Islam and Colonialism*, p. 30; al-Ṣāwī, *Bulghah al-Sālik*, Vol. 2, p. 185.
[188] Al-Shaybānī, *Al-Siyar al-Kabīr*, Vol. 1, p. 257; Ibn Mawdūd, *Al-Ikhtiyār*, Vol. 4, p. 132.
[189] Al-Shaybānī, *Al-Siyar al-Kabīr*, Vol. 2, p. 473, Vol. 4, p. 1132; Ibn Mawdūd, *Al-Ikhtiyār*, Vol. 4, p. 131; al-Nawawī, *Al-Majmūʾ*, Vol. 21, p. 71; al-Shirbīnī, *Mughnī al-Muḥtāj*, Vol. 4, p. 237; al-Samarqandī, *Tuḥfah al-Fuqahā'*, Vol. 3, p. 296; al-Shawkānī, *Nayl al-Awṭār*, Vol. 8, p. 181; al-Firjānī, *Uṣūl al-ʾAlāqāt*, 128.
[190] Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 195; al-Ghazālī, *Al-Waṣīt*, Vol. 7, p. 43; al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, pp. 258-262.

protected with regard to his person and his money, but has to be retuned to his place of safety.[191]

### 4.8.3 Procedure of Granting *Amān*

The jurists are unanimous that any word or phrase which directly or indirectly indicates the granting of *amān*, in Arabic or in any other language, whether spoken or in writing, constitutes a valid *amān*. Moreover, any gesture or word that is rightly or even wrongly understood by an enemy combatant as granting him *amān* entitles him to the status of *musta'min*. Thus, if an enemy assumes, for any reason, that a Muslim has given him *amān*, then the *amān* is valid, even if the Muslim had no intention of granting it.[192] Common phrases or words indicating *amān* are, for example, "do not be afraid", "you are safe", "drop your weapon", "stop" or "you are in my protection"[193] or the Persian word "*matras*"[194] (do not be afraid).

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[191] Al-Shāfiʿī, *Al-Umm*, Vol. 4, p. 284; Peters, *Islam and Colonialism*, p. 30.

[192] Muḥyī al-Dīn ibn Sharaf al-Nawawī, *Minhāj al-Ṭālibīn wa 'Umdah al-Muftīn*, ed. Muḥammad Muḥammad Ṭāhir Shaʿbān (Jeddah: Dār al-Minhāj, 2005/1426), p. 523; al-Shirbīnī, *Mughnī al-Muḥtāj*, Vol. 4, p. 237; Ibn Mufliḥ, *Al-Furū'*, Vol. 6, p. 227; ʿAlī ibn Sulaymān al-Mirdāwī, *Al-Inṣāf fī Ma'rifah al-Rājiḥ min al-Khilāf 'alā Madhhab al-Imām Aḥmad Ibn Ḥanbal*, ed. Muḥammad Ḥamid al-Fiqī (Beirut: Dār Iḥyā' al-Turāth al-ʿArabī, n.d.), Vol. 4, p. 205; al-Armanāzī, *Al-Shar' al-Dawlī*, p. 166; Khadduri, *The Law of War and Peace*, p. 79; Mahmassani, "The Principles of International Law in the Light of Islamic Doctrine", p. 256; Mahmassani, *Al-Qānūn wa al-'Alāqāt*, pp. 96 f.; Ṣaqr, *'Al-'Alāqāt al-Dawliyyah*, p. 83; Moinuddin, *The Charter of the Islamic Conference*, p. 57; al-Firjānī, *Uṣūl al-'Alāqāt*, p. 127; Zīdān, *Aḥkām al-Dhimmiyyn*, p. 46; al-Ṣaqqār, "Niẓām al-Amān", p. 93; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 2, p. 1178.

[193] See, for example, al-Shāfiʿī, *Al-Umm*, Vol. 4, p. 284; al-Nawawī, *Al-Majmū'*, Vol. 21, pp. 67 f.; Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 258; Ibn Qudāmah, *Al-Kāfī*, Vol. 4, pp. 162 f.; Ibn Qudāmah, *'Umdah al-Fiqh*, p. 156; al-Shirbīnī, *Mughnī al-Muḥtāj*, Vol. 4, p. 238; al-Ramlī, *Nihāyah al-Muḥtāj*, Vol. 8, p. 81; al-Ghazālī, *Al-Waṣīt*, Vol. 7, pp. 44 f.; al-Ghazālī, *Al-Wajīz*, Vol. 2, p. 194; al-Qarāfī, *Al-Dhakhīrah*, Vol. 3, pp. 445 f.; al-Buhūtī, *Kashshāf al-Qinā'*, Vol. 3, pp. 105 f.; al-Mirdāwī, *Al-Inṣāf*, Vol. 4, p. 205; al-Rahaybānī, *Maṭālib*, Vol. 2, p. 579; Abī Bakr ibn al-Sayyid Muḥammad Shaṭā al-Dumyāṭī, *Ḥāshiyah I'ānah al-Ṭālibīn 'alā Ḥall Alfāẓ Fatḥ al-Mu'īn li-Sharḥ Qurrah al-'Ayn bi-Muhimmāt al-Dīn* (Beirut: Dār al-Fikr, n.d.), Vol. 4, pp. 207 f.; al-Zarkashī, *Sharḥ al-Zarkashī*, Vol. 3, p. 217; Muḥammad ibn ʿAbd al-Wahhāb, *Mukhtaṣar al-Inṣāf wa al-Sharḥ al-Kabīr*, ed. ʿAbd al-ʿAzīz ibn Zayd al-Rūmī, Muḥammad Biltājī and Sayyid Ḥijāb (Riyadh: Maṭābiʿ al-Riyādh, n.d.), p. 394; al-Armanāzī, *Al-Shar' al-Dawlī*, p. 166; al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, pp. 285-295, 317; ʿAbbās Shūmān, *Al-'Alāqāt al-Dawliyyah fī al-Sharī'ah al-Islāmiyyah*, Silsilah al-Dirāsat al-Fiqhīyyah, No. 1 (Cairo: Al-Dār al-Thaqāfiyyah lil-Nashr, 1999/1419), p. 74: Peters, *Islam and Colonialism*, p. 30; Ṣaqr, *'Al-'Alāqāt al-Dawliyyah*, p. 83; Sābiq, *Fiqh al-Sunnah*, Vol. 3, p. 26; Moinuddin, *The Charter of the Islamic Conference*, p. 57.

[194] Pronounced either *matras*, *matars*, or *maṭras*. See, for example, al-Nawawī, *Tahdhīb al-Asmā'*, Vol. 3, p. 310; Ibn Manṣūr, *Sunan Sa'īd Ibn Manṣūr*, Vol. 2, p. 272; Ibn Ḥusām al-Dīn, *Kanz al-*

The jurists disagreed over the permissibility of granting *amān* after the capture of enemy belligerents. According to al-Zuḥaylī, the Mālikī jurists stipulate that enemy belligerents have the right to *musta'min* status as long as they are not captured.[195] Some Shāfiʿī jurists argue that enemy belligerents still can be granted *amān* after their capture, but not after they are handed over to the head of state. The Ḥanafī jurists and al-Awzāʿī validate the *amān* granted by any Muslim, even after the enemy's capture, i.e., to enemy prisoners of war, because the Prophet approved the *amān* granted by his daughter, Zaynab, to her husband Abū al-ʿĀṣ ibn al-Rabīʿ during his captivity. [196] Therefore, the *amān* in this case is not merely granting protection but freeing prisoners of war. The jurists who opposed granting *amān* to captives, despite the above precedent set by the Prophet, appear to advocate their position on the grounds that an individual Muslim should not have the right to free war prisoners and that this responsibility should be left to the Muslim head of state.

Furthermore, interestingly enough, Ibn Qudāmah advocates that the mere fact of the enemy belligerent's attempt to peacefully enter Muslim territory entitles him to *amān*. Ibn Qudāmah states that the enemy's action in itself signifies that he assumes he will be safe and this resembles the case of *amān* granted by a gesture from a Muslim.[197] In other words, what Ibn Qudāmah is advocating here is that enemy belligerents are automatically entitled to the status of *amān* if they ever require it. He thus envisages the case of an enemy belligerent who is captured inside Muslim territory and then claims that he came as a *musta'min*. In this case, Ibn

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*ʿUmmāl*, Vol. 4, p. 208; Ibn Mālik, *Muwaṭṭa'*, Vol. 2, p. 448; al-Buhūtī, *Kashshāf al-Qināʿ*, Vol. 3, p. 106; al-Rahaybānī, *Maṭālib*, Vol. 2, p. 579; ʿAbd Allah ibn ʿAbd al-ʿAzīz al-Bakrī, *Muʿjam ma Istuʿjim min Asmā' al-Bilād wa al-Mawādiʿ*, ed. Muṣṭafā al-Saqqā (Beirut: ʿĀlam al-Kutub, 1992-3/1403), Vol. 1, p. 316.

[195] Al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, p. 277. See also al-Nawawī, *Al-Majmūʿ*, Vol. 21, p. 70; Shūmān, *Al-ʿAlāqāt al-Dawliyyah fī al-Sharīʿah*, p. 80.

[196] Al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, pp. 277 f.; Shūmān, *Al-ʿAlāqāt al-Dawliyyah fī al-Sharīʿah*, p. 79.

[197] Ibn Qudāmah, *Al-Kāfī*, Vol. 4, p. 163.

Qudāmah argues that if the enemy was not carrying weapons upon his capture, he is entitled to *amān* because this is an indication that he did not come to commit acts of war. This situation is similar to the modern act of carrying a white flag. But if an enemy belligerent is caught carrying weapons upon his capture, his claim to *amān* is unacceptable because his weapons indicate that he came as a "warrior".[198]

Moreover, in the case of a Muslim who captures an enemy belligerent and, upon their arrival before the Muslim authorities, the captive claims that his captor granted him *amān* while his captor denies doing so, the jurists, according to Ibn Qudāmah, put forward three different opinions. The first is that captor's statement should be accepted and the captive's claim to *amān* rejected. The second is that the captive's claim should be accepted because his claim may be true and this probability is enough justification to save his life, or in other words to grant him *amān* status. The third is that, if the captive possesses weapons and is stronger than his Muslim captor, then the captive's claim to *amān* should be accepted because this situation proves his claim is true. On the other hand, if he is weaker than his captor and his weapons are seized from him, this situation proves that his captor's claim is true.[199]

### 4.8.4 Duration and Termination of *Amān*

According to the majority of jurists, the duration of *amān* is one year and no tax is required during this period, but if a *musta'min* decides to stay for more than a year, he is required to pay the *jizyah*, exactly like the *dhimmis*, the permanent non-Muslim citizens of the Islamic state.[200] According to al-Zuḥaylī, the Ḥanbalī jurists did not

[198] Ibid.
[199] Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 197; Ibn Qudāmah, *Al-Kāfī*, Vol. 4, pp. 163 f. For a different ruling concerning this case, see Peters, *Islam and Colonialism*, p. 31.
[200] Al-Ghazālī, *Al-Waṣīt*, Vol. 7, pp. 44 f.; al-Ghazālī, *Al-Wajīz*, Vol. 2, p. 194; al-Armanāzī, *Al-Shar' al-Dawlī*, p. 166; Khadduri, *The Law of War and Peace*, pp. 78 f.; Mahmassani, "The Principles of International Law in the Light of Islamic Doctrine", p. 256; Mahmassani, *Al-Qānūn wa al-'Alāqāt*, p.

require the payment of *jizyah* even if the *amān* contract exceeds the duration of one year.[201] For al-Shāfiʿī, the duration of *amān* should not exceed four months; otherwise the payment of *jizyah* will be required.[202] It should be added here that this time restriction does not apply to *amān* granted to women because they are exempt from the payment of *jizyah*.[203] If, at any time, a *musta'min* converts to Islam, the *amān* contract is terminated and he becomes entitled to stay permanently in the Islamic state. In this case, the Islamic obligations will be applicable to him, including the payment of *zakāh* and participation in jihād if this is required and if he is physically fit. Furthermore, if a *musta'min* purchases land in the Islamic state and starts to pay tax on it, his status changes to that of a *dhimmi* because this indicates his intention to remain permanently in the Islamic state.[204]

A valid *amān* is thus a binding contract upon Muslims and no Muslim, even the head of state, al-Shirbīnī confirms, can revoke it unless the *amān* proves to be detrimental to Muslim interests - if, for example, a *musta'min* proves to be a spy.[205] Nonetheless, some Ḥanafī and Mālikī jurists maintain that the *amān* is not to be revoked even if the *musta'min* proves to be a spy.[206] If the *amān* contract is cancelled, a *musta'min* still enjoys the right of protection until he is conducted back to his place of safety.[207] The *amān* contract terminates at the end of its term or upon the accomplishment of the mission for which an envoy or a trader has entered the

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96; al-Hindī, *Aḥkām al-Ḥarb wa al-Salām*, p. 20; 'Afīfī, *Al-Mujtamaʿ al-Islāmī*, p. 235; F.A. Klein, *The Religion of Islam*, 1st paperback ed. (London: Curzon Press, 1985), p. 180.

[201] Al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, pp. 304-307.

[202] Al-Shāfiʿī, *Al-Umm*, Vol. 4, p. 190; Shūmān, *Al-ʿAlāqāt al-Dawliyyah fī al-Sharīʿah*, p. 82; Peters, *Islam and Colonialism*, p. 31.

[203] See, for example, al-Shirbīnī, *Mughnī al-Muḥtāj*, Vol. 4, p. 238; al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, p. 304.

[204] Al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, p. 251. See Peters, *Islam and Colonialism*, p. 31.

[205] Al-Shirbīnī, *Mughnī al-Muḥtāj*, Vol. 4, p. 238; al-Ghazālī, *Al-Waṣīt*, Vol. 7, pp. 44 f.; Peters, *Islam and Colonialism*, pp. 31 f.; Ṣaqr, *ʿAl-ʿAlāqāt l-Dawliyyah*, p. 88; Shūmān, *Al-ʿAlāqāt al-Dawliyyah fī al-Sharīʿah*, p. 106.

[206] Shūmān, *Al-ʿAlāqāt al-Dawliyyah fī al-Sharīʿah*, p. 106.

[207] Peters, *Islam and Colonialism*, pp. 31 f.; Ṣaqr, *Al-ʿAlāqāt al-Dawliyyah*, p. 90.

Islamic state. It is worth noting here that the jurists are unanimous that messengers, or in modern day terminology ambassadors, diplomats or envoys, are automatically entitled to *amān* status.[208] Their protection is incumbent on the Islamic state by virtue of the nature of their mission, let alone that they enjoy non-combatant immunity.[209]

### 4.8.5 The *Musta'min*'s Rights and Obligations

It is surprising that the classical jurists did not explicitly specify the obligations of the *musta'min*. In addition to the obligation to respect the law and public order, it stands to reason that the *musta'min* is obliged not to commit any hostile acts inside the Islamic territories or spy on the Islamic state. In other words, he should not commit any acts detrimental to the interests of the Islamic state, and it is also prohibited for him to practise usury.[210] The *musta'min* has the right to purchase and export from the Islamic state any commodity, except weapons and slaves, this

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[208] Al-Shawkānī, *Nayl al-Awṭār*, Vol. 8, pp. 181-183; al-Shawkānī, *Al-Sayl al-Jarrār*, Vol. 4, pp. 560 f.; Mahmassani, *Al-Qānūn wa al-ʿAlāqāt*, p. 97; Sābiq, *Fiqh al-Sunnah*, Vol. 3, p. 68; Peters, *Islam and Colonialism*, p. 31; Afīfī, *Al-Mujtamaʿ al-Islāmī*, p. 280; Zīdān, *Aḥkām al-Dhimmiyyn*, pp. 52 f.; Bilājī, "Sharīʿah al-Ḥarb fī al-Sīrah", pp. 127 f.; Weeramantry, *Islamic Jurisprudence*, pp. 141 f.; Lambton, *State and Government in Medieval Islam*, pp. 209 f.

[209] See, for example, Ibn Qayyim al-Jawziyyah, *Jāmiʿ al-Fiqh*, Vol. 4, p. 93; al-Shirāzī, *Al-Muhadhdhab*, Vol. 3, p. 278; Shūmān, *Al-ʿAlāqāt al-Dawliyyah fī al-Sharīʿah*, p. 78; al-Ṣaqqār, "Niẓām al-Amān", pp. 91 f.; Afīfī, *Al-Mujtamaʿ al-Islāmī*, pp. 227-229; Abū al-Wafā, *Al-Naẓariyyah al-ʿĀmmah*, pp. 184-188; Bilājī, "Sharīʿah al-Ḥarb fī al-Sīrah", pp. 127 f.; Farhad Malekian, *The Concept of Islamic International Criminal Law: A Comparative Study* (London: Graham & Trotman, 1994), p. 72; Hashmi, "Islam, Sunni", p. 219. On the protection, immunity and privileges of diplomats in Islamic law, see M. Cherif Bassiouni, "Protection of Diplomats under Islamic Law", *American Journal of International Law*, Vol. 74, 1980, pp. 609-633; Weeramantry, *Islamic Jurisprudence*, p. 142; Aḥmad ʿAbd al-Wanys Shitā, *Al-Uṣūl al-ʿĀmmah lil-ʿAlāqāt al-Dawliyyah fī al-Islām Waqt al-Silm: Dirāsah fī Taḥlīl Aham Adawāt al-ʿAlāqāt al-Khārijiyyah lil-Dawlah al-Islāmiyyah*, Mashrūʿ al-ʿAlāqāt al-Dawliyyah fī al-Islām 5 (Cairo: Al-Maʿhad al-ʿĀlamī lil-Fikr al-Islāmī, 1996), pp. 145-166; Pirzada "Islam and International Law", pp. 215-218; Malekian, *The Concept of Islamic International Criminal Law*, pp. 109-112. For some examples of the protection, immunity and privileges of diplomats in the Muslim countries throughout the Islamic history see, Obaidullah Fahad, "Principles of Diplomacy in Islam: Privileges and Immunities", *Hamdard Islamicus*, Vol. XII, No. 3, Autumn 1989, pp. 41-48.

[210] Khadduri, *War and Peace*, p. 167; al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, pp. 250 f.; Ṣaqr, *ʿAl-ʿAlāqāt al-Dawliyyah*, p. 89; al-Ṣaqqār, "Niẓām al-Amān", p. 98.

prohibition obviously being because weapons and slaves will strengthen the Muslims' enemy.[211]

The jurists' discussions of the *musta'min*'s rights focus primarily on the protection of his property and his right of litigation. They are unanimous that if a *musta'min* dies during his stay in the Islamic state, his property must be sent to his heirs in his own country. If he has no heirs, Ibn Qudāmah adds, his property will be confiscated as spoils of war, but according to al-Qarāfī, it should be returned to the authorities in his own country.[212] If a *musta'min* leaves his property in the Islamic state and returns to the enemy state to conduct business or to visit his country and return to the Islamic state, his *amān* is still valid with respect to his person and the property he left behind. In this case also if he dies in his country, contrary to Abū Ḥanīfah and al-Shāfiʿī's position, the money he left behind is to be sent to his heirs in the *dār al-ḥarb*.[213] Moreover, if he returns to fight for his country against the Islamic state, according to the majority of jurists, apart from al-Awzāʿī, Abū Ḥanīfah and al-Shāfiʿī, his *amān* is still valid with regard to his property but not in respect of his person.[214] Moreover, according to al-Qarāfī, even if a *musta'min* dies while fighting against the Islamic state, his property must be returned to his heirs, but if he is captured during the war and then executed, his property becomes spoils of war.[215]

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[211] Al-Shawkānī, *Al-Sayl al-Jarrār*, Vol. 4, p. 563; Khadduri, *The Law of War and Peace*, p. 80; al-Ṣaqqār, "Niẓām al-Amān", p. 98.
[212] See, for example, al-Shāfiʿī, *Al-Umm*, Vol. 4, p. 278; Ibn Qudāmah, *Al-Kāfī*, Vol. 4, p. 164; al-Qarāfī, *Al-Dhakhīrah*, Vol. 3, pp. 446 f.; al-Ṭabarī, *Ikhtilāf al-Fuqahā'*, pp. 52 f.; Abū Zahrah, *Al-ʿAlāqāt al-Dawliyyah fī al-Islām*, p. 69; Ṣaqr, *Al-ʿAlāqāt al-Dawliyyah*, p. 89.
[213] See, for example, Ibn ʿAbd al-Wahhāb, *Mukhtaṣar al-Inṣāf*, pp. 395 f.
[214] Ibn Qudāmah, *Al-Kāfī*, Vol. 4, p. 164; al-Ṭabarī, *Ikhtilāf al-Fuqahā'*, pp. 51 f.; Abū Zahrah, *Al-ʿAlāqāt al-Dawliyyah fī al-Islām*, p. 69. Concerning the case of the *musta'min* who dies in his own country leaving property in the Islamic state, Khadduri inaccurately states: "If the musta'min, after he returned to dār al-ḥarb, leaving his property in the dār al-Islām, suddenly died, his property could not be taken out of the dār al-Islām by his heirs; instead, it would be confiscated by the state." Khadduri, *War and Peace*, p. 168. See also Khadduri, *The Law of War and Peace*, p. 80.
[215] Al-Qarāfī, *Al-Dhakhīrah*, Vol. 3, p. 447.

The *musta'min* has the right to take Muslims, *dhimmis* and other *musta'mins* to the Islamic courts. The judge is obliged, according to Ḥanafīs,[216] to settle cases related to debts and other disputes because the Islamic state is obliged to protect the *musta'min* against any injustice. However, al-Zuḥaylī states that most jurists maintain that the Muslim judge can choose whether to adjudicate such cases.[217]

In agreement with Article 70 of the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War,[218] the jurists agree that a *musta'min* cannot be tried for crimes he committed outside the Islamic state, even if he has killed a Muslim.[219] Thus, the jurists here are unanimous that the Islamic state has no jurisdiction with regard to crimes committed by non-Muslims outside its territories.[220]

Concerning the jurisdiction of the Islamic state with regard to crimes committed by temporary non-Muslim residents of the Islamic state, the *musta'mins*, the majority of the jurists maintain that they are subject to punishment in accordance with Islamic law. However, Abū Ḥanīfah who pioneered the doctrine of restricting the jurisdiction of Islamic laws to the crimes committed inside the territories of the Islamic state by its permanent citizens, distinguished between two kinds of crimes committed by the *musta'mins*: crimes against the rights of God (*ḥuqūq Allah*) and crimes against the rights of humans (*ḥuqūq al-ʿibād*). The *musta'mins* are subject to punishment for crimes against the rights of humans, but they are not subject to punishment for crimes against the rights of God. For example, if a *musta'min* kills a

[216] See al-Shaybānī, *Al-Siyar*, p. 179.
[217] Al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, p. 250; al-Ṣaqqār, "Niẓām al-Amān", p. 99. The majority of the jurists based their position on the Qur'ānic utterance: "if they come to you [oh, Muḥammad in order to settle disputes among them], then adjudicate between them or decline". Qur'ān 5:42.
[218] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August, 1949, available from http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/6756482d86146898c125641e004aa3c5; Internet; accessed 31 August 2009.
[219] Ṣaqr, *ʾAl-ʿAlāqāt al-Dawliyyah*, p. 89.
[220] Al-Shaybānī, *Al-Siyar*, p. 179; al-Armanāzī, *Al-Sharʿ al-Dawlī*, pp. 88, 164.

Muslim, a *dhimmi* or another *musta'min* in the Islamic state, the Islamic punishment will be inflicted upon him.[221] But if a *musta'min* commits theft, fornication or adultery, Abū Ḥanīfah and al-Shaybānī state that he is not subject to Islamic punishment.[222] Rather, in the case of theft, he is obliged to return the stolen property because it comes under the category of the rights of humans, but amputation of the hand, the Islamic punishment for theft, is not applicable because it is God's right.

The Ḥanafī jurists justified the inapplicability of Islamic punishments for crimes committed by temporary residents in the Islamic state by taking the view that there is no contract with them that they should become *dhimmis* and thus agree to become subject to the jurisdiction of the Islamic state.[223] This indicates that the word "*ṣāghirūn*" in the Qur'ānic phrase: "until they pay the *jizyah ʿan yad* (willingly) and they are *ṣāghirūn* (submissive to the Islamic rule)",[224] means that non-Muslims become subject to Islamic jurisdiction, as maintained by the majority of Muslim scholars,[225] not that they are humiliated as some have interpreted it.

**4.9 Prisoners of War**

The jurists' discussion of Islamic rulings on enemy prisoners of war also typifies the nature of the greatest part of Islamic law. It should be added here that the jurists' discussion of prisoners of war refers to adult male enemy combatants: women and

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[221] Al-Shaybānī, *Al-Siyar*, p. 180; Abū Yūsuf, *Al-Radd*, pp. 94 f.; Mahmassani, *Al-Qānūn wa al-ʿAlāqāt*, p. 99; ʿAwdah, *Criminal Law of Islam*, Vol. I, pp. 336 f.
[222] Mahmassani, *Al-Qānūn wa al-ʿAlāqāt*, p. 99.
[223] Al-Shaybānī, *Al-Siyar*, p. 180; Abū Yūsuf, *Al-Radd*, pp. 94-96; Abū Zahrah, *Al-ʿAlāqāt al-Dawliyyah fī al-Islām*, pp. 70 f.; Khadduri, *War and Peace*, p. 167; Mahmassani, "The Principles of International Law in the Light of Islamic Doctrine", p. 257; al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, p. 253; Shūmān, *Al-ʿAlāqāt al-Dawliyyah fī al-Sharīʿah*, p. 95.
[224] Qur'ān 9:29.
[225] See, for example, al-Shāfiʿī, *Al-Umm*, Vol. 4, pp. 207, 210, 279, 284; Aḥmad Muṣṭafā al-Marāghī, *Tafsīr al-Marāghī* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1946/1365), Vol. 10, pp. 91, 95; Faṭānī, *Ikhtilāf al-Dārīn*, pp. 48 f.

children who are captured are to be enslaved or exchanged for Muslim prisoners.[226] In accordance with the sources of Islamic law, second/eighth and third/ninth century Muslim jurists based their rulings on the Qur'ān and the precedents of the Prophet. On the one hand, the Qur'ānic revelation that directly addresses the rulings on the prisoners of war commands Muslims to: "set them free either graciously or by ransom".[227] Thus, this Qur'ānic command states that Muslims are obliged, after the cessation of hostilities, to free their prisoners of war either freely, or in exchange for Muslim prisoners of war or for ransom.

On the other hand, a few jurists based their ruling on the prisoners of war upon the Qur'ānic revelation: "kill the polytheists wherever you find them",[228] and the precedents set by the Prophet in his treatment of prisoners of war indicate that he adopted four different courses of action: first, the execution of three Meccans; second, releasing prisoners freely; third, setting prisoners free in exchange for Muslim prisoners or for money - and some of the prisoners taken at the Battle of Badr were set free in exchange for teaching ten Muslim children to read and write;[229] fourth, enslaving prisoners of war. These Qur'ānic references and the Prophet's precedents caused a great controversy among the jurists.

The parties to this controversy can, however, be generally divided into three main groups: according to the first group, including Ibn ʿAbbās, ʿAbd Allah ibn

[226] See, for example, al-Shāfiʿī, *Al-Umm*, Vol. 4, p. 260; al-Nawawī, *Al-Majmūʻ*, Vol. 21, p. 81; al-Ṣāwī, *Bulghah al-Sālik*, Vol. 2, p. 186; Ibn Qudāmah, *Al-Mughnī*, Vol. 9, pp. 177-197; Ṣaqr, *ʻAl-ʻAlāqāt al-Dawliyyah*, pp. 128 f.; Sābiq, *Fiqh al-Sunnah*, Vol. 3, p. 61; Muḥammad Ra'fat ʿUthmān, *Al-Ḥuqūq wa al-Wājibāt wa al-ʻAlāqāt al-Dawliyyah fī al-Islām*, 4th ed. (Cairo: Dār al-Ḍiyā', 1991), p. 203.

[227] Qur'ān 47:4.

[228] Qur'ān 9:5.

[229] See, for example, al-Shawkānī, *Nayl al-Awṭār*, Vol. 8, p. 144; Mahmassani, *Al-Qānūn wa al-ʻAlāqāt*, pp. 257 f.; Darwazah, *Al-Jihād fī Sabīl Allah*, p. 205; ʿĀmir, *Aḥkām al-Asrā*, p. 185; Ṣaqr, *Falsafah al-Ḥarb*, p. 157; al-Zayd, *Al-Qānūn al-Dawlī al-Insānī*, p. 43; Bilājī, "Sharīʿah al-Ḥarb fī al-Sīrah", p. 132; Muḥammad Ḥammīdullāh, *The Battlefields of the Prophet Muhammad, with Maps, Illustrations and Sketches: A Continuation to Muslim Military History* (New Delhi: Kitab Bhavan, 2003), p. 41; Doi, *Sharīʻah: The Islamic Law*, p. 447; Romahi, *Studies in International Law*, p. 64; Weeramantry, *Islamic Jurisprudence*, p. 135; Alsumaih, "The Sunni Concept of Jihad", p. 148; Bennoune, "Humanitarian Law in Islamic Jurisprudence", p. 634.

ʿUmar (d. 73/693), al-Ḥasan al-Baṣrī (d. 110/728), ʿAṭā',[230] Saʿīd ibn Jubayr (d. 95/714), Mujāhid,[231] and even, according to al-Ḥasan ibn Muḥammad al-Tamīmī, "the consensus of the Prophet's companions",[232] the Islamic ruling on prisoners of war is restricted to releasing them either freely or in exchange for ransom, as stipulated in the Qur'ān (47:4). Moreover, this group argues that this verse abrogated the other options which were followed by the Prophet, namely, execution and enslavement.[233]

The second group, the Ḥanafī jurists, advocate that the head of state is entitled to either execute the prisoners or enslave them in accordance with what is in the best interest of the Muslims.[234] Thus, in stark contradiction to the first group, Abū Ḥanīfah rejected releasing prisoners freely and exchanging them for Muslim prisoners or for ransom,[235] i.e., the only two options advocated by the first group. Abū Ḥanīfah's rejection of these two options is justified by the fear that releasing

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[230] See, for example, ḥadīth number 9404 in al-Ṣanaʿānī, *Al-Muṣannaf*, Vol. 5, p. 210; Jalāl al-Dīn al-Suyūṭī, *Al-Durr al-Manthūr* (Beirut: Dār al-Fikr, 1993), Vol. 7, pp. 458 f.; Muḥammad ibn ʿAlī ibn Muḥammad al-Shawkānī, *Fatḥ al-Qadīr: Al-Jāmiʿ bayn Fannay al-Riwāyah wa al-Dirāyah min ʿIlm al-Tafsīr* (Beirut: Dār al-Fikr, n.d.), Vol. 5, p. 33; al-Ṭabarī, *Ikhtilāf al-Fuqahā'*, p. 145; al-Shawkānī, *Nayl al-Awṭār*, Vol. 8, p. 145; Mahmassani, *Al-Qānūn wa al-ʿAlāqāt*, p. 257; al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, p. 439; al-Zuḥaylī, *Al-ʿAlāqāt al-Dawliyyah*, p. 82; Sābiq, *Fiqh al-Sunnah*, Vol. 3, p. 62; Ṣaqr, *Al-ʿAlāqāt al-Dawliyyah*, p. 119; ʿUthmān, *Al-Ḥuqūq*, pp. 205 f.; Lena Salaymeh, "Early Islamic Legal-Historical Precedents: Prisoners of War", *Law and History Review*, Vol. 26, No. 3, Fall 2008, p. 528.

[231] Hindī, *Aḥkām al-Ḥarb wa al-Salām*, p. 209; Salaymeh, "Early Islamic Legal-Historical Precedents: Prisoners of War", p. 528. See also Al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 2, pp. 854 f.

[232] Ibn Rushd, *Bidāyah al-Mujtahid*, Vol. 1, p. 279; Ḥammīdullāh, *Muslim Conduct of State*, p. 214; Mahmassani, *Al-Qānūn wa al-ʿAlāqāt*, p. 257; al-Hindī, *Aḥkām al-Ḥarb wa al-Salām*, p. 209; ʿĀmir, *Aḥkām al-Asrā*, p. 174; al-Zayd, *Al-Qānūn al-Dawlī al-Insānī*, p. 44; Naqvi, "Laws of War in Islam", p. 38; Salaymeh, "Early Islamic Legal-Historical Precedents: Prisoners of War", p. 528.

[233] Mahmassani, *Al-Qānūn wa al-ʿAlāqāt*, p. 257; ʿUthmān, *Al-Ḥuqūq*, pp. 205 f.; ʿĀmir, *Aḥkām al-Asrā*, pp. 174-179.

[234] Al-Shaybānī, *Al-Siyar*, p. 134; Salaymeh, "Early Islamic Legal-Historical Precedents: Prisoners of War", p. 530.

[235] See, for example, al-Nawawī, *Al-Majmūʿ*, Vol. 21, p. 81; ʿUthmān ibn ʿAlī al-Zaylaʿī, *Tabīīn al-Ḥaqā'iq: Sharḥ Kanz al-Daqā'iq* (Cairo: Dār al-Kutub al-Islāmī, 1895-6/1313), Vol. 3, p. 249; al-Samarqandī, *Tuḥfah al-Fuqahā'*, Vol. 3, p. 302; Ibn Mawdūd, *Al-Ikhtiyār*, Vol. 4, p. 133; al-Ṣanaʿānī, *Subul al-Salām*, Vol. 4, p. 55; al-Shawkānī, *Nayl al-Awṭār*, Vol. 8, p. 145; Sābiq, *Fiqh al-Sunnah*, Vol. 3, p. 62; Mahmassani, "The Principles of International Law in the Light of Islamic Doctrine", p. 306; Mahmassani, *Al-Qānūn wa al-ʿAlāqāt*, p. 255; Ṣaqr, *'Al-ʿAlāqāt al-Dawliyyah*, p. 128; Abū ʿĪd, *Al-ʿAlāqāt al-Dawliyyah fī al-Fiqh al-Islāmī*, pp. 250 f. However, it is worth adding here that Abū Yūsuf states that Abū Ḥanīfah accepts exchanging enemy prisoners for Muslim prisoners but disliked exchanging them for money. See al-Shaybānī, *Al-Siyar*, p. 250.

enemy prisoners, either freely or in exchange for Muslim prisoners, would strengthen the enemy.[236] However, al-Shaybānī here disagrees with his teacher Abū Ḥanīfah and accepts the exchange of enemy prisoners for Muslim prisoners.[237] Moreover, some Ḥanafī jurists advocate that the head of state is also entitled to free the prisoners but allow them to stay in the Islamic state and pay the *jizyah*. They should not be allowed to return to the enemy state because they would strengthen the enemy. However, Arab polytheists are excluded from this option.[238]

The third group, the majority of the Muslim jurists, including the Shāfiʿīs, the Mālikīs, the Ḥanbalīs, al-Awzāʿī, Abū Thawr and al-Thawrī, broadened the options for the head of state. Depending on what he deems to best serve the interest of the Muslims, he is entitled to choose one of the following four options: to execute some or all of the prisoners, to enslave them, to set them free or to exchange them for Muslim prisoners or for money.[239] It is interesting to note here that the second caliph, ʿUmar ibn al-Khaṭṭāb, prohibited the enslavement of Arabs.[240] The Mālikīs added a fifth option: prisoners can be permitted to stay in the Islamic state in return for the payment of the *jizyah*.[241] It is claimed that Mālik, the eponymous founder of the

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[236] Ibn Mawdūd, *Al-Ikhtiyār*, Vol. 4, p. 133; al-Ṭabarī, *Ikhtilāf al-Fuqahā'*, p. 146; Mahmassani, "The Principles of International Law in the Light of Islamic Doctrine", p. 307; Mahmassani, *Al-Qānūn wa al-ʿAlāqāt*, p. 256; ʿĀmir, *Aḥkām al-Asrā*, p. 193.

[237] Ibn Mawdūd, *Al-Ikhtiyār*, Vol. 4, p. 133; al-Samarqandī, *Tuḥfah al-Fuqahā'*, Vol. 3, p. 302; al-Hindī, *Aḥkām al-Ḥarb wa al-Salām*, p. 208; ʿĀmir, *Aḥkām al-Asrā*, pp. 186, 193.

[238] Al-Zaylaʿī, *Tabīīn al-Ḥaqā'iq*, Vol. 3, p. 249; Ibn Mawdūd, *Al-Ikhtiyār*, Vol. 4, p. 133; Ibn ʿĀbidīn, *Ḥāshiyah Radd al-Muḥtār*, Vol. 4, p. 139.

[239] Al-Nawawī, *Al-Majmūʿ*, Vol. 21, p. 81; Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 179; al-Māwardī, *Al-Aḥkām al-Sulṭāniyyah*, p. 68; al-Shirāzī, *Al-Muhadhdhab*, Vol. 3, pp. 281 f.; Ibn Qayyim al-Jawziyyah, *Jāmiʿ al-Fiqh*, Vol. 4, p. 67; al-Zarkashī, *Sharḥ al-Zarkashī*, Vol. 3, p. 175; al-Anṣārī, *Fatḥ al-Wahhāb*, Vol. 2, p. 302; Mahmassani, "The Principles of International Law in the Light of Islamic Doctrine", p. 307; ʿUthmān, *Al-Ḥuqūq*, pp. 203-205.

[240] Al-Shāfiʿī, *Al-Umm*, Vol. 4, pp. 271 f.; al-Suyūṭī, *Jāmiʿ al-Aḥādīth*, Vol. 14, p. 379; al-Bayhaqī, *Sunan al-Bayhaqī*, Vol. 9, p. 73; Ibn Ḥusām al-Dīn, *Kanz al-ʿUmmāl*, Vol. 4, p. 232; Mahmassani, "The Principles of International Law in the Light of Islamic Doctrine", p. 307; Mahmassani, *Al-Qānūn wa al-ʿAlāqāt*, p. 254.

[241] See, for example, al-Qarāfī, *Al-Dhakhīrah*, Vol. 3, p. 414; Ibn Rushd, *Bidāyah al-Mujtahid*, Vol. 1, p. 279; al-Nafarāwī, *Al-Fawākih al-Dawānī*, Vol. 1, p. 398; al-Ṣāwī, *Bulghah Aal-Sālik*, Vol. 2, p. 186; al-Zuḥaylī, *Al-ʿAlāqāt al-Dawliyyah*, p. 82.

Mālikī school, unlike the other jurists of his school, rejected the free release of prisoners.[242]

The permissibility of the execution of prisoners in principle, as advocated by the majority of jurists in cases where it serves the Muslim interest, is based on the instances of the execution of three male Meccans: al-Naḍir ibn al-Ḥārith and ʿUqbah ibn Muʿayṭ, taken prisoner at the Battle of Badr (Ramaḍān 2/March 624) and Abū ʿAzzah al-Jumaḥī,[243] captured at the battle of Uḥud (Shawwāl 3/March 625). It is worth adding here that Abū ʿAzzah was among the prisoners taken at Badr and was freed by the Prophet on condition that he would not fight against the Muslims again,[244] but when he was captured again at Uḥud, he was executed. There are no other instances of prisoners being executed by Muslims during the Prophet's lifetime.

Apart from the doubts that were cast over the authenticity of the reports about the execution of the two prisoners taken at Badr and whether they were killed during the fighting or after their capture,[245] these three individuals were singled out for execution from among the seventy prisoners of Badr, obviously not because of the fact that they were prisoners of war, but because of their excessive persecution of,

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[242] Al-Nawawī, *Al-Majmūʿ*, Vol. 21, p. 81; al-Shawkānī, *Nayl al-Awṭār*, Vol. 8, p. 145; Sābiq, *Fiqh al-Sunnah*, Vol. 3, p. 62.

[243] His full name is ʿAmr ibn ʿAbd Allah ibn ʿUmayr ibn Wahb ibn Ḥudhāfah ibn Jumaḥ, see al-Wāqidī, *Al-Maghāzī*, Vol. 1, pp. 135, 263.

[244] Al-Nawawī, *Al-Majmūʿ*, Vol. 21, p. 83; al-Ṣanaʿānī, *Subul al-Salām*, Vol. 4, p. 55; al-Hindī, *Aḥkām al-Ḥarb wa al-Salām*, p. 208; Abū al-Wafā, *Al-Naẓariyyah al-ʿĀmmah*, p. 183; Bilājī, "Sharīʿah al-Ḥarb fī al-Sīrah", p. 134. According to Guillaume's translation of Ibn Isḥāq's biography of the Prophet: "Abū ʿAzza[h] al-Jumaḥī had been spared by the apostle at Badr because he was a poor man with a large family. He had been taken prisoner, and said, 'I am a poor man with a large family and great need, as you know, so spare me,' and the apostle let him go." Guillaume, *The Life of Muhammad*, p. 370.

[245] See al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, p. 437, footnote no. 6; Ch. Pellat, "Al-Naḍīr b. al-Ḥārith b. ʿAlḳama b. Kalada b. ʿAbd Manāf b. ʿAbd al-Dār b. Ḳuṣayy", *Encyclopaedia of Islam*, New ed., Vol. VII, p. 872; Salaymeh, "Early Islamic Legal-Historical Precedents: Prisoners of War", pp. 524 f.

and hostility towards, the Muslims during the Meccan period.[246] In other words, these three individuals were executed because they were guilty of “war crimes”.[247]

Despite all these stark contradictions among the jurists, they unanimously agree on one thing: that the ruling on prisoners of war is left to the discretion of the head of state. He is to choose from the various options offered by the jurists, depending on what best serves the *maṣlaḥah*. In other words, according to the jurists, the *maṣlaḥah* is the only criterion upon which the head of state is to decide the Islamic ruling on the prisoners of war.[248] Furthermore, al-Shāfiʿī stipulates that it is prohibited for the head of state to choose to either execute or free some or all of the prisoners, unless his choice will serve the *maṣlaḥah*.[249]

### 4.9.1 Treatment of Prisoners

Most of the Islamic position on the treatment of the prisoners of war is based on the incident of the seventy or, according to some biographers, forty-three prisoners[250]

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[246] See, for example, Darwazah, *Al-Jihād fī Sabīl Allah*, pp. 131, 205; Haykal, *The Life of Muḥammad*, pp. 233, 239; al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, pp. 437 f.; al-Hindī, *Aḥkām al-Ḥarb wa al-Salām*, p. 209; ʿĀmir, *Aḥkām al-Asrā*, pp. 206, 208; Aḥmad ʿAbd al-Raḥman, *Al-Islām wa al-Qitāl* (Cairo: Dār al-Sharq al-Awṣaṭ lil-Nashr, 1990), pp. 132-135; Alsumaih, “The Sunni Concept of Jihad”, p. 149; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 2, pp. 858-860.

[247] Thomas, “Prisoners of War in Islam”, p. 49; Thomas, “Jihad’s Captives”, pp. 94 f.; Bilājī, “Sharīʿah al-Ḥarb fī al-Sīrah”, pp. 133 f.; Alsumaih, “The Sunni Concept of Jihad”, pp. 149 f. See also al-Quṭb Muḥammad al-Quṭb Ṭabliyyah, *Al-Islām wa Ḥuqūq al-Insān: Al-Jihād* ([Cairo]: Dār al-Fikr al-ʿArabī; al-Nahḍah al-Miṣriyyah; al-Mujallad al-ʿArabī, al-Ṣaḥwah, 1989/1409), p. 64; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 2, pp. 858-862. Troy S. Thomas states that the two prisoners of Badr were executed because they were guilty of war crimes. He adds that in Islam “Execution [of prisoners of war] is <u>only</u> allowed if the individual is tried and found guilty of war crimes.” Thomas, “Prisoners of War in Islam”, p. 49; Thomas, “Jihad’s Captives”, pp. 94 f. He adds that “These crimes must exceed a prisoner’s legal right to belligerency and bitter enmity against Islam.” Thomas, “Jihad’s Captives”, p. 95.

[248] See, for example, al-Shaybānī, *Al-Siyar*, p. 134; al-Shāfiʿī, *Al-Umm*, Vol. 4, p. 260; al-Nawawī, *Al-Majmūʿ*, Vol. 21, p. 81; Muḥyī al-Dīn ibn Sharaf al-Nawawī, *Rawḍah al-Ṭālibīn wa ʿUmdah al-Muftīn*, 2nd ed. (Beirut: Al-Maktab al-Islāmī, 1984-5/1405), Vol. 10, p. 251; al-Shirāzī, *Al-Muhadhdhab*, Vol. 3, pp. 281 f.; al-Māwardī, *Al-Aḥkām al-Sulṭāniyyah*, p. 68; Ibn Qayyim al-Jawziyyah, *Jāmiʿ al-Fiqh*, Vol. 4, p. 67; Ibn Qudāmah, *ʿUmdah al-Fiqh*, p. 153; al-Buhūtī, *Sharḥ Muntahā al-Irādāt*, Vol. 1, p. 625; al-Buhūtī, *Kashshāf al-Qināʿ*, Vol. 3, p. 53; al-Rahaybānī, *Maṭālib*, Vol. 2, p. 521; al-Shawkānī, *Nayl al-Awṭār*, Vol. 8, p. 145; Sābiq, *Fiqh al-Sunnah*, Vol. 3, p. 61; ʿĀmir, *Aḥkām al-Asrā*, pp. 184-210.

[249] Al-Shāfiʿī, *Al-Umm*, Vol. 4, p. 260.

[250] For the names of the forty three prisoners of Badr according to the biography of Ibn Isḥāq, see Guillaume, *The Life of Muhammad*, pp. 338 f.

taken at the Battle of Badr. Prior to this incident, a group of Muslims captured two Meccans; but apart from that there are no reports of enemy prisoners of war being held in captivity[251] because all of the battles with the enemies of the Muslims that took place during the Prophet's lifetime ended with either one or both of the parties to the conflict leaving the battlefield after the conclusion of a treaty, or the suffering of a maximum of few dozen casualties on both sides. During this period, prisoners of war were either held in the mosque or divided among the Companions of the Prophet.[252] When the Prophet divided the prisoners taken at Badr to be housed with the Companions, he instructed them to: "Observe good treatment towards the prisoners".[253]

Abū ʿAzīz ibn ʿUmayr ibn Hāshim, one of the prisoners of Badr, narrates how the Muslims, following the Prophet's instructions, treated him well during his captivity, as translated by Guillaume, in the following words: "I was with a number of the Anṣār when they [Muslim captors] brought me from Badr, and when they ate their morning and evening meals they gave me the bread and ate the dates themselves in accordance with the orders that the apostle had given about us. If anyone had a morsel of bread he gave it to me. I felt ashamed and returned it to one of them but he returned it to me untouched."[254] Abū al-ʿĀṣ ibn al-Rabīʿ and al-Walīd

[251] See Salaymeh, "Early Islamic Legal-Historical Precedents: Prisoners of War", pp. 526 f.
[252] Al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, p. 409; al-Zayd, *Al-Qānūn al-Dawlī al-Insānī*, p. 65; al-Mubarak, "Warfare in Early Islam", p. 204.
[253] See, for example, al-Suyūṭī, *Jāmiʿ al-Aḥādīth*, Vol. 1, p. 28; al-Ṣāliḥī, *Subul al-Hudā*, Vol. 4, p. 66; Ibn Ḥusām al-Dīn, *Kanz al-ʿUmmāl*, Vol. 4, p. 165; Muḥammad ibn Jarīr al-Ṭabarī, *Tārīkh al-Ṭabarī: Tārīkh al-Umam wa al-Mulūk* (Bierut: Dār al-Kutub al-ʿIlmiyyah, 2001), Vol. 2, p. 39; Abū al-Wafā, *Al-Naẓariyyah al-ʿĀmmah*, p. 179; Muḥammad Fahād al-Shalāldah, *Al-Qānūn al-Dawlī al-Insānī* (Alexandria, Egypt: Munsha'ah al-Maʿārif, 2005), pp. 22 f.; Ḥammīdullāh, *Muslim Conduct of State*, p. 214; Guillaume, *The Life of Muhammad*, p. 309; Alsumaih, "The Sunni Concept of Jihad", p. 147.
[254] Guillaume, *The Life of Muhammad*, p. 309. See also Ibn Isḥāq, *Al-Sīrah*, Vol. 2, p. 218; Ismāʿīl ibn ʿUmar ibn Kathīr, *Al-Bidāyah wa al-Nihāyah* (Beirut: Maktabah al-Maʿrifah, n.d.), Vol. 3, p. 307; al-Ṣāliḥī, *Subul al-Hudā*, Vol. 4, p. 66; al-Ṭabarī, *Tārīkh al-Ṭabarī*, Vol. 2, p. 39; Ṣaqr, *Al-ʿAlāqāt al-Dawliyyah*, pp. 108 f.; al-Hindī, *Aḥkām al-Ḥarb wa al-Salām*, p. 205; ʿĀmir, *Aḥkām al-Asrā*, p. 147; Ghunaym, *Al-Jihād al-Islāmī*, p. 86; Abū al-Wafā, *Al-Naẓariyyah al-ʿĀmmah*, p. 181; al-Zayd, *Al-Qānūn al-Dawlī al-Insānī*, pp. 37, 65; al-Mubarak, "Warfare in Early Islam", p. 202; Alsumaih, "The

ibn al-Walīd ibn al-Mughīrah, from the prisoners taken at Badr, also relate that they received the same treatment from their captors.[255]

This noble and altruistic treatment of enemy prisoners of war is described in the Qur'ān as follows: "And they feed the needy, the orphans and the captives [out of their] food, despite their love for it [or also interpreted as: because of their love for God]. Indeed, we feed you for the sake of pleasing God: we do not wish reward or gratitude from you."[256] The jurists therefore agree that prisoners should be fed and, following the precedent set by the Prophet with one of the prisoners taken at Badr, clothed if need be.[257] Prisoners should be protected from the heat, cold, hunger, thirst and any kind of torture.[258] Furthermore, it is prohibited to torture enemy prisoners of war to obtain military information. When Mālik was asked about the Islamic ruling

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Sunni Concept of Jihad", p. 147; Salaymeh, "Early Islamic Legal-Historical Precedents: Prisoners of War", p. 525.

[255] Al-Wāqidī, *Al-Maghāzī*, Vol. 1, p. 117.

[256] Qur'ān 76:8. Bennoune notes that "Muslim tradition sometimes went as far as feeding prisoners before feeding soldiers and releasing prisoners when food was not available for them." Bennoune, "Humanitarian Law in Islamic Jurisprudence", p. 633.

[257] Ḥammīdullāh, *Muslim Conduct of State*, p. 215; Ḥammīdullāh, *Battlefields*, p. 40; al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, p. 413; Mahmassani, *Al-Qānūn wa al-ʿAlāqāt*, p. 257; Ṣaqr, *Al-ʿAlāqāt al-Dawliyyah*, p. 108; Marsoof, "Islam and International Humanitarian Law", p. 25; al-Hindī, *Aḥkām al-Ḥarb wa al-Salām*, p. 205; ʿĀmir, *Aḥkām al-Asrā*, p. 148; 'Afīfī, *Al-Mujtamaʿ al-Islāmī*, pp. 213 f.; al-Mawdūdī, *Sharīʿah l-Islām fī al-Jihād*, p. 193; Abū al-Wafā, *Al-Naẓariyyah al-ʿĀmmah*, p. 181; al-Zayd, *Al-Qānūn al-Dawlī al-Insānī*, pp. 36-38, 68, 79; Bilājī, "Sharīʿah al-Ḥarb fī al-Sīrah", p. 132; al-Ḥifnī, *Mawsūʿah al-Qur'ān*, Vol. 2, p. 1907; Doi, *Sharīʿah: The Islamic Law*, p. 446; Pirzada "Islam and International Law", p. 208; Weeramantry, *Islamic Jurisprudence*, p. 135; al-Mubarak, "Warfare in Early Islam", pp. 205 f.; Romahi, *Studies in International Law*, p. 64; Malekian, *The Concept of Islamic International Criminal Law*, p. 158; Bedjaoui, "The Gulf War of 1980-1988 and the Islamic Conception of International Law", p. 192; Naqvi, "Laws of War in Islam", p. 34; Thomas, "Prisoners of War in Islam", p. 50; Thomas, "Jihad's Captives", p. 95; Stewart, *Unfolding Islam*, p. 79; Anisseh Van Engeland, "The Differences and Similarities between International Humanitarian Law and Islamic Humanitarian Law: Is there Ground for Reconciliation?", *Journal of Islamic Law and Culture*, Vol. 10, No. 1, April 2008, p. 89; Salaymeh, "Early Islamic Legal-Historical Precedents: Prisoners of War", p. 525; Ṣāliḥ ibn ʿAbd Allah al-Shitrī, "Ḥuqūq al-Asrā fī al-Islām", available from http://islamtoday.net/articles/show_articles_content.cfm?id=37&catid=73&artid=1314; Internet; accessed 4 July 2008.

[258] Ḥammīdullāh, *Muslim Conduct of State*, p. 215; al-Buhūtī, *Kashshāf al-Qināʿ*, Vol. 3, p. 53; al-Zuḥaylī, *Al-ʿAlāqāt al-Dawliyyah*, p. 78; Bilājī, "Sharīʿah al-Ḥarb fī al-Sīrah", p. 132; Ben Ashoor, *Islam and International Humanitarian Law*, p. 6; Pirzada "Islam and International Law", p. 208; Tawfīq Wahbah, *Al-Ḥarb fī al-Islām wa fī al-Mujtamaʿ al-Dawlī al-Muʿāṣir*, Kutub Islāmiyyah, Issue 145 (Cairo: Supreme Council for Islamic Affairs, 1973/1393), pp. 77-79; ʿĀmir, *Aḥkām al-Asrā*, p. 149; Doi, *Sharīʿah: The Islamic Law*, p. 446; Malekian, *The Concept of Islamic International Criminal Law*, p. 158; Van Engeland, "The Differences and Similarities between International Humanitarian Law and Islamic Humanitarian Law", p. 89.

on the torture of enemy prisoners to obtain military intelligence about the enemy, he replied that he never heard that this could be Islamically permissible.[259]

It is important to add here that the jurists commonly agree that it is prohibited for the Islamic state to execute enemy hostages under its control, even if the enemy slaughtered the Muslim hostages they held. This prohibition is based on the Qur'ānic injunction: "No sinful person shall be liable for the sin committed by another."[260] Here some jurists refer with pride to the precedent of the caliph Muʿāwiyah ibn Abī Sufyān (d. 60/680) when he refused to execute the Roman hostages under his control after the Roman emperor had broken the treaty with the Muslims by executing the Muslim hostages he held.[261] It is worth pointing out here that this precedent does not mean that hostage-taking as a military tactic is permissible under Islamic law. But this precedent refers to a context in which these hostages were exchanged between the Muslim caliph and the Roman emperor in order to ensure that neither of them would revoke the peace treaty.

Similar to the provision of Article 82 of the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War,[262] the jurists agree that, during the prisoners' captivity or enslavement, members of the same family should not be separated; children should not be separated from their parents or grandparents or siblings.[263]

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[259] Al-ʿAbdarī, *Al-Tāj wa al-Iklīl*, Vol. 3, p. 353; al-Zuḥaylī, *Āthār al-Ḥarb fī al-Islām*, p. 415; al-Hindī, *Aḥkām al-Ḥarb wa al-Salām*, p. 205. See also ʿĀmir, *Aḥkām al-Asrā*, p. 149; al-Zayd, *Al-Qānūn al-Dawlī al-Insānī*, p. 36; al-Shitrī, "Ḥuqūq al-Asrā fī al-Islām"; al-Mubarak, "Warfare in Early Islam", p. 207; Bedjaoui, "The Gulf War of 1980-1988 and the Islamic Conception of International Law", p. 290. On the prohibition of torture in Islamic International criminal law, see Malekian, *The Concept of Islamic International Criminal Law*, pp. 103-106.

[260] Qur'ān 6:164; 17:15; 35:18; 39:7; 53:38.

[261] Al-Qarāfī, *Al-Dhakhīrah*, Vol. 12, p. 12; al-Māwardī, *Al-Aḥkām al-Sulṭāniyyah*, p. 70. See also on the prohibition of "murder of hostages" Abou El Fadl, "Islam and the Theology of Power", p. 30.

[262] Geneva Convention (IV).

[263] See, for example, Ibn Qayyim al-Jawziyyah, *Jāmiʿ al-Fiqh*, Vol. 4, p. 70; Ibn Qudāmah, *Al-Mughnī*, Vol. 9, pp. 212-214; Ibn Qudāmah, *Al-Kāfī*, Vol. 4, p. 132; Ibn Qudāmah, *ʿUmdah al-Fiqh*, p. 153; al-Buhūtī, *Kashshāf al-Qināʿ*, Vol. 3, pp. 57 f.; Ṣaqr, *Al-ʿAlāqāt al-Dawliyyah*, pp. 110 f.; Abū al-Wafā, *Al-Naẓariyyah al-ʿĀmmah*, pp. 182, 202-206; al-Zayd, *Al-Qānūn al-Dawlī al-Insānī*, pp. 39

The jurists also discussed the legal effect of captivity or enslavement on the religion of children and the marriage of one or a couple of wedded prisoners, i.e., if one or both of them are held in captivity or enslavement. If children are captured alone, i.e., if neither of their parents is captured with them, they are to grow as Muslims. But if children are captured with one or both of their parents, then apart from al-Awzāʿī, the majority of jurists agree that they should retain the religion of their parents.[264]

Concerning the effect of enslavement on marriage, the jurists are unanimous that the marriage is dissolved if the wife is captured alone. But if the husband is captured alone, then the marriage is not dissolved. If both a husband and a wife are captured together then, unlike Abū Ḥanīfah and al-Awzāʿī, al-Shāfiʿī, Abū Thawr, al-Layth and al-Thawrī argue that the marriage should be dissolved.[265]

Significantly, some jurists discussed what Muslims should do if prisoners cannot be transported to the Islamic territories for logistical reasons. The Mālikī jurists, according to Peters, "state explicitly that enough food and other necessities must be left with them, so that they will not die of hunger or cold. If this obligation cannot be fulfilled from seized enemy property, then the Moslem treasury [*bayt al-māl*) must provide for this."[266] However, al-Shaybānī holds that the head of state should kill the men and hire transportation for the women and children,[267] although, according to another Ḥanafī jurist, Ibn Mawdūd, because of the prohibition of killing

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f., 77; Ḥammīdullāh, *Muslim Conduct of State*, p. 215; Mahmassani, *Al-Qānūn wa al-ʿAlāqāt*, p. 253; Pirzada "Islam and International Law", p. 208; Weeramantry, *Islamic Jurisprudence*, p. 135; Romahi, *Studies in International Law*, p. 64; Naqvi, "Laws of War in Islam", p. 34; Thomas, "Prisoners of War in Islam", p. 50; Thomas, "Jihad's Captives", p. 95; Marsoof, "Islam and International Humanitarian Law", p. 26.

[264] Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 215; Mahmassani, "The Principles of International Law in the Light of Islamic Doctrine", p. 306; Mahmassani, *Al-Qānūn wa al-ʿAlāqāt*, p. 252.

[265] Ibn Qudāmah, *Al-Mughnī*, Vol. 9, pp. 215 f.; Mahmassani, "The Principles of International Law in the Light of Islamic Doctrine", p. 306; Mahmassani, *Al-Qānūn wa al-ʿAlāqāt*, p. 253.

[266] Peters, *Islam and Colonialism*, p. 23; Ṣaqr, *Al-ʿAlāqāt al-Dawliyyah*, p. 111.

[267] Al-Shaybānī, *Al-Siyar*, p. 109. See Johnson, *The Holy War Idea*, p. 124.

women and children, they should be left to die. His justification for not saving their lives is that the children would grow up and fight against the Muslims, while women produce children who will also grow up and fight.[268]

These three juristic opinions are significant in some aspects. Peters here gives only the Mālikī jurists' opinion, which shows the Mālikī ethical stance, while Johnson refers only to al-Shaybānī's opinion, thanks to Khadduri's translation of al-Shaybānī's work. Ibn Mawdūd's opinion which could easily be argued to be un-Islamic, is not referred to, at least by Peters and Johnson. This raises the question of which of these three opinions, for example, represents the Islamic position, not to mention the possible existence of other opinions. The conclusion is that these opinions, which are scattered throughout the corpus juris of individual Muslim jurist-scholars, makes it almost impossible to cover all the juridical opinions on many issues. But more importantly, the crucial point here is the grounds upon which these jurists advocated their opinions, which are clearly based on pragmatic, political concerns about winning the war, not on religious imperatives. This proves that the portrayal of the bulk of the jurists' opinions and judgements as unchangeable holy laws, i.e., sharīʿah, is a fallacy.

### 4.10 Conclusion

Laws are not created in a vacuum. All laws originate in a particular time and context and aim to create and/or regulate specific conduct in order to achieve specific objectives. The time and situational factors explain the change of focus of both Muslim and Western scholars from the Islamic *jus in bello* to the Islamic *jus ad bellum*, and vice-versa, throughout history. Classical Muslim jurists focused on the

[268] Ibn Mawdūd, *Al-Ikhtiyār*, Vol. 4, p. 134.

Islamic *jus in bello* because they wanted to regulate the conduct of Muslims during a period in history when war was the normal state of international relations unless a peace treaty was concluded between its members. The modern Muslim world has undergone radical changes in its political and legal systems which are of no less importance than the changes in contemporary international society. Contemporary Muslim scholars have done the opposite of their classical predecessors, first because international society has come to an agreement on the prohibition of offensive wars, and second because they have apparently neglected to focus on addressing the Islamic *jus in bello* in the contexts of modern war, because the dictates of international law and the Geneva Conventions and their additional protocols satisfy the same objectives as those of Islamic law.

But the case of Western scholars appears to be more interesting than that of their Muslim counterparts. In fact, Islamic law has not received adequate interest in Western scholarship. Moreover, as one of the major legal systems of the world, and possibly in the area of Islamic family law the most widely used legal system in the world, Islamic law has not been utilized as a potential contribution to the world legal system. The reasons why Western scholars have ignored the Islamic *jus in bello* and focused on the Islamic *jus ad bellum* are that, first, they have been motivated by the desire to explain the reasons for the spread of Islam and the expansion of the Islamic state, particularly during the first century of the history of Islam. Second, many technical difficulties confront Western researchers on Islamic law because this area is linked to other disciplines, such as Islamic history and Qur'ānic studies. Third, the lack of works in European languages adds to the difficulties in the area. Fourth, and more importantly, studying the Islamic law of war entails examining the nature of the process of forming it.

This study of Islamic *jus in bello*, it is hoped, has cleared some of the misunderstandings about the Islamic *jus ad bellum*. Jihād has usually been portrayed in Western literature as a holy war to convert non-Muslims by the sword, or as a war to universalize the rule of Islam and plunder, let alone the claim that it was to pursue sex. This study of the Islamic *jus in bello* has indicated that the strict prohibition against targeting enemy non-combatants including clergy, on the one hand, and the protection granted by virtue of the system of *amān* to non-Muslim enemy combatants and the citizens of enemy states who desire to enter the Islamic state, on the other, disprove the claim that jihād is a holy war to convert by force or kill infidels. If that were the case, Muslim soldiers would have exterminated their enemy combatants, prisoners of war or *musta'mins,* or stipulated their conversion to Islam as a condition for granting them *amān*. In addition, the mere fact that Islam accepts the payment of the *jizyah* from non-Muslim citizens living in the Islamic state undermines the claim that the aim of jihād was to force non-Muslims to convert to Islam.

The protection granted to the possessions of *musta'mins* during their stay in the Islamic state and the stipulation that these possessions should be repatriated if they die or, for some jurists, if they are killed while fighting against the Islamic state, to their heirs or the state authorities in their home countries, refutes the claim that plunder was a justification for jihād. The justifications and stipulations given by the jurists for the permissibility of Muslim soldiers to eat and give fodder to their animals using enemy property indicate the sanctity of enemy property. However, after the cessation of hostilities, seized enemy property becomes the spoils of war in accordance with the tradition of war of that time.

Moreover, the claim that jihād was used as an instrument for the universalization of Islam or Islamic rule is based on one of two false premises: that

Islam was spread by force or by “economic desires”,[269] such that jihād, in the sense of military offensives against non-Muslims, was a tool for ensuring that the message of Islam was conveyed, as explained in the previous chapter. The resort to acts of hostility came only as a third option after the non-Muslims’ refusal to accept Islam or enter into a treaty with the Islamic state to maintain their religion and peaceful relations with the Islamic state in return for the payment of the *jizyah*, or other arrangements. This conception of jihād as a militarized mission was dictated by the surrounding paradigm of international relations during the specific period in history in which this conception of jihād was maintained. This is why modern Muslim scholars maintain that jihād in the form of militarized missions “has become obsolete”[270] and jihād at present should therefore take the form of conveying the message of Islam via the Internet, the mass media and any other audio or written means of propagating it.[271]

The failure in the West to study the nature of Islamic law and the process of Islamic legislation has led to the common misconception in Western literature that Islamic law, sharīʿah, is simply a divine and, therefore, unchangeable law system. This is perhaps what ʿAbd al-Razzāq al-Sanhūrī (1895-1971), described as “Undisputedly the master re-builder of Arab law in the twentieth century”,[272] meant when he notes that some orientalists have assumed that sharīʿah is rigid and unchangeable because they are historians and not jurists.[273] In fact, the functionalism and pragmatic nature of the law, which characterized the jurists’ discussion of the

[269] Jurji, “The Islamic Theory of War”, pp. 333 f.
[270] Peters, *Jihad in Classical and Modern Islam*, p. 117; Muhammad al-Atawneh, “*Shahāda* versus Terror in Contemporary Islamic Legal Thought: The Problem of Suicide Bombers”, *Journal of Islamic Law and Culture*, Vol. 10, No. 1, April 2008, p. 21.
[271] See Peters, *Jihad in Classical and Modern Islam*, p. 117; Maḥmūd, “Al-Jihād wa Akhlāqiyyāt al-Ḥarb fī al-Islām”, p. 859; al-Atawneh, “*Shahāda* versus Terror”, p. 21.
[272] Amr Shalakany, “Between Identity and Redistribution: Sanhuri, Genealogy and the Will to Islamaise”, *Islamic Law and Society*, Vol. 8, No. 2, 2001, p. 202.
[273] See Muḥammad Muṣṭafā Shalabī, *Al-Fiqh al-Islāmī bayn al-Mithāliyyah wa al-Wāqiʿiyyah* (Beirut: Al-Dār al-Jāmiʿiyyah, 1982), p. 109.

Islamic *jus in bello*, proves that labelling the Islamic law of war in general as divine law is fallacious.

Muslim jurists operate in a framework which consists of three factors: the sources and objectives of the law, on the one hand, and the methodologies for pronouncing on the laws, on the other. Studies of Islamic laws should, as this chapter attempts to do, indicate these three factors in relation to all Islamic rulings. This helps outsiders, not only non-Muslims but also Muslims who are not involved in the process of pronouncing on Islamic laws, to understand the objectives and, thus, the changeability of some of the laws.

But the main characteristic of the Islamic *jus in bello* is that most Islamic rulings are interpreted, deduced or made by individual, independent jurist-scholars. Their various interpretations of the intentions of the Islamic sources, and their different ways of relating their respective interpretations to changing situations, result in the majority of Islamic law developing into contradictory laws, as illustrated above. It is worth adding here also that part of Islamic law is hypothetical, in the sense that some jurists, mainly of the Ḥanafī school, imagined specific situations and advocated Islamic rulings for them.

The emergence of such contradictory juristic rulings should have led Muslim jurists to discuss their application in war situations, particularly since the objective of Islamic international humanitarian law is to regulate the conduct of Muslims during hostilities but, surprisingly, the jurists did not discuss this issue. The fact that they were satisfied with simply collecting contradictory rulings, and even sometimes reporting contradictory rulings attributed to the same jurist, and at most advocating or endorsing certain of them, indicates that the jurists were presenting a spectrum of

Islamic juristic rulings rather than specifying the way in which they should be applied.

These laws cease to be valid if they do not achieve their objectives. If a situation changes, the law should change in such a way as to achieve the result that was originally intended. This is a juristic principle which the classical jurists call *al-ḥukm yadūr maʻa al-ʻillah* (the ruling evolves with the effective cause).[274] Moving from theory to practice, this inevitable process of adapting Islamic rulings to different situations or making Islamic laws for new situations, requires a body of jurists to exercise the ongoing process of *ijtihād*. At present, the Muslim world has tended to exercise collective *ijtihād*.[275] Several juristic research and *fatwa* councils and departments have been established for this purpose throughout the Muslim world, Europe and North America.[276]

All these attempts to exercise collective *ijtihād* have been addressing issues of contemporary concern to Muslims, including the emergence of Muslim minorities living in the West. But "for about a century"[277] some voices have expressed concern that, in the light of the current world situation and in the interests of Muslims, it is necessary to codify and renew Islamic juristic rulings (*fiqh*) to form a body of

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[274] See, for example, ʿAbd al-Karīm Zīdān, *Al-Wajīz fī Uṣūl al-Fiqh*, 5th ed. (Beirut: Mu'assasah al-Risālah, 1996/1417), pp. 201-204; ʿAbd al-Wahhāb Khallāf, *ʻIlm Uṣūl al-Fiqh* (Cairo: Dār al-Ḥadīth, 2003/1423), pp. 71-75.

[275] See Muḥammad al-Disūqī, *Al-Tajdīd fī al-Fiqh al-Islāmī* (Beirut: Dār al-Madār al-Islāmī, 2006), pp. 184-192.

[276] To mention few examples, in Egypt the Islamic Research Council was established in 1961; in Jeddah in Saudi Arabia, the International Islamic Fiqh Academy, a subsidiary body of the Organization of the Islamic Conference, was established in January 1981. This Academy currently contains *fiqh* experts from forty-three Muslim countries: http://www.fiqhacademy.org; also in Saudi Arabia, in Mecca, the Islamic Fiqh Council, affiliated to the Muslim World League, was established on 12 November 1977: http://www.themwl.org/Bodies/default.aspx?l=AR&d=1&bid=2; in the United States of America, the Fiqh Council of North America was established in 1986: http://www.fiqhcouncil.org/; and also in the United States, the Assembly of Muslim Jurists of America: http://www.amjaonline.com/index.php; in Dublin, Ireland, there is the European Council for Fatwa and Research, which held its inaugural meeting in London, United Kingdom on 29-30 March 1977: http://e-cfr.org/en/.

[277] Al-Disūqī, *Al-Tajdīd fī al-Fiqh al-Islāmī*, p. 12.

Islamic law collected from all the different schools of Islamic jurisprudence.[278] This codification would ensure the applicability of Islamic law as a legal system which can be enforced by the state.[279] These voices echo the second/eighth century call by Ibn al-Muqaffaʿ (d. 139/756) for the codification of a body of Islamic law.[280] However, Joseph Schacht anticipated the failure of such attempts to codify Islamic law. He claimed that "traditional Islamic law… is by its nature incompatible with being codified, and every codification must subtly distort it".[281] However, it is interesting to add here that, under the sponsorship of the United Nations Development Programme, the Republic of the Maldives, a small Muslim country located in the Indian Ocean with a constitutional democracy, commissioned professor Paul H. Robinson, a leading world specialist in the codification of criminal law, to draft its first codified penal law on the basis of the sharīʿah.[282]

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[278] Al-Qaraḍāwī, *Al-Fiqh al-Islāmī*, pp. 23-74; Shalabī, *Al-Fiqh al-Islāmī*, pp. 220 f.; Muḥammad, *Al-Fiqh al-Islāmī*, pp. 238 f.; al-Disūqī, *Al-Tajdīd fī al-Fiqh al-Islāmī*, pp. 145-149. On the renewability of the sharīʿah, see Muḥammad, *Al-Fiqh al-Islāmī*, pp. 83-94. On the meaning of the concept of renewing *fiqh*, see al-Disūqī, *Al-Tajdīd fī al-Fiqh al-Islāmī*, pp. 35-59. On the renewability of *fiqh*, see al-Qaraḍāwī, *Al-Fiqh al-Islāmī*, pp. 83-86. On the renewal of *fiqh*, see Muḥammad, *Al-Fiqh al-Islāmī*, pp. 215-249. It is worth mentioning here that the ministry of Endowments and Religious Affairs in the Sultanate of Oman held an international conference under the title "Codification and Renewal in the Contemporary Islamic Jurisprudence" in the period between 5-8 April 2008. Information available from http://www.maraoman.net/main.asp?ArticleId=62; Internet; accessed 6 June 2008. On what Schacht calls, the modification or "re-shaping of Islamic law by modernist jurisprudence" in some Muslim countries during the twentieth century, see Joseph Schacht, "Problems of Modern Islamic Legislation", *Studia Islamica*, No. 12, 1960, pp. 114-129.

[279] See al-Disūqī, *Al-Tajdīd fī al-Fiqh al-Islāmī*, p. 145.

[280] Muḥammad, *Al-Fiqh al-Islāmī*, pp. 234 f. On a few other attempts, including the successful Ottoman empire's, to codify Islamic law throughout Islamic history, see Muḥammad, *Al-Fiqh al-Islāmī*, pp. 235-237; Schacht, "Islamic Law in Contemporary States", pp. 133-147; Abdullahi Ahmed An-Naʿim, "Sharīʿa in the Secular State: A Paradox of Separation and Conflation", in Peri Bearman, Wolfhart Heinrichs and Bernard G. Weiss, eds., *The Law Applied: Contextualizing the Islamic Sharīʿa, A Volume in Honor of Frank E. Vogel*. London: I.B. Tauris, 2008, p. 330. On modern attempts to codify the sharīʿah in certain Muslim countries see, Ann Elizabeth Mayer, "The Sharīʿah: A Methodology or a Body of Substantive Rules?", in Nicholas Heer, ed., *Islamic Law and Jurisprudence* (Seattle: University of Washington Press, 1990), pp. 177-198.

[281] Schacht, "Problems of Modern Islamic Legislation", p. 108.

[282] Paul H. Robinson, a non-Muslim professor of criminal law – and not a specialist in sharīʿah – at the University of Pennsylvania Law School, "has done consulting on criminal code drafting for a number of American states and countries in many parts of the world". Writing on this project Robinson and his eleven-member Criminal Law Research Group chosen for this project conclude: "While it was a concern that any Shari'a-based code could conflict with international norms, in practice it became apparent that the conflict was not as great as many would expect. Opportunities for accommodation were available, sometimes through interesting approaches by which the spirit of the

It should be mentioned here that the reason for the survival of Islamic law throughout the centuries and for the increasing calls among some Muslims for the applications of Islamic law[283] is that Muslims have willingly resorted to applying to themselves Islamic laws chosen from among the various schools of law. This is especially the case where Muslim individuals apply Islamic laws to their own situation in the areas of acts of worship, morality, family law and financial transactions. But, in the light of the growing calls for, and resort to, Islamic law among Muslims, on the one hand, and the tendency among Western scholars to attribute the behaviour of Muslims to Islam, on the other, it stands to reason that, if Islamic law is to be enforced or rightly judged, Muslims must codify an enforceable body of Islamic rulings. Moreover, in the area of Islamic international humanitarian law, it is illogical to expect Muslims to enforce contradictory rulings. The enforcement of Islamic laws therefore requires contemporary Muslim jurists to draw

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Shari'a rule could be maintained without violating international norms. In the end, this Shari'a-based penal code drafting project yielded a Draft Code that bring together justice to Maldivians and also provide a useful starting point for penal code drafting in other Muslim countries, especially those with an interest in moving toward international norms. But the code drafting project also may have much to offer penal code reform in non-Muslim countries, for the structure and drafting forms invented here often solve problems that plague most penal codes, even codes of modern format such as those based upon the American Law Institute's Model Penal Code, which served as the model for most American penal codes… While it may seem odd that a draft penal code for a small Islamic island-nation barely rising from the Indian Ocean could provide advances in the United States, we think it very much the case", Paul H. Robinson, et al., "Codifying Shari'a: International Norms, Legality & the Freedom to Invent New Forms", 2006; available from http://lsr.nellco.org/cgi/viewcontent.cgi?article=1104&context=upenn/wps; Internet; accessed 1 May 2009, p. 61. See also for this codification project, Paul H. Robinson and the University of Pennsylvania Law School Criminal Research Group, "Final Report: Penal Law & Sentencing Codification Project for the Maldives", 2 Vols., January 2006; available from http://www.law.upenn.edu/fac/phrobins/draftislamicpenalcode/; Internet; accessed 1 May 2009.

[283] For example, Nik Rahim Nik Wajis, a Malaysian scholar, writes in the introduction of his PhD thesis: "Nowadays, Muslims in most Muslim countries are striving in every aspect to revive *Sharīʿa* law. [Moreover, he affirms in his conclusion that] As for all Muslim countries, *Sharīʿa* law is no doubt an ideal law for them and it should be reintroduced." Nik Rahim Nik Wajis, "The Crime of *Ḥirāba* in Islamic Law" (PhD thesis, Glasgow Caledonian University, 1996), pp. V, 230. Interestingly, Lisa Wedeen adds that: "A fundamental concern of many contemporary Muslims is the need to check the arbitrary powers of leaders and institute the rule of law, and strict application of the sharia is seen by many as a way of checking tyranny while ensuring procedural justice", Lisa Wedeen, "Beyond the Crusades: Why Huntington, and bin Laden are Wrong", *Middle East Policy*, Vol. X, No. 2, Summer 2003, p. 58. See also al-Disūqī, *Al-Tajdīd fī al-Fiqh al-Islāmī*, pp. 167 f. Some amendments have been made to partially or wholly re-Islamize the legal systems in Egypt, the Sudan, Pakistan, Kuwait, Algeria and Yemen, see Olivier Roy, "Bin Laden: An Apocalyptic Sect Severed from Political Islam", *East European Constitutional Review*, Vol. 10, Fall 2001, p. 110.

up Islamic codes of law, drawing on the contradictory rulings advocated by the individual Muslim jurist-scholars throughout history. In many cases, current situations, which are no longer those of the classical jurists' time, will force contemporary Muslim jurists to modify the classical rulings or give new ones, but on the basis of the same Islamic methodologies and objectives as those pursued by their classical predecessors.

This chapter has shown that the classical Muslim jurists' discussions of the issues presented by war in their time indicate that their overarching concern was the fear of taking the life of enemy non-combatants, even as collateral damage. Their discussions of the issues of human shields, night attacks and weapons show a striking concern not to bring about the indiscriminate killing of innocent non-combatants during military operations between the army of the Islamic state and the army of the enemy, notwithstanding the limited destructive ability of their primitive weaponry. It is evident that the classical jurists developed a full-blown doctrine of non-combatant immunity based on specific Islamic sources and aimed at regulating their specific war contexts. They developed a complete set of rules to regulate the major issues treated in the Geneva Conventions and their additional protocols.

It may be concluded that ignoring the dictates of Islamic laws on the conduct of Muslims in war and regarding acts of terrorism committed by bands of Muslims as Islamic is doing a major injustice to Islamic law. Indeed, the name of Islam has been one of the main victims of this phenomenon. These terrorist acts have targeted Muslims in Muslim countries, as well as non-Muslims. In the light of the above discussion of the regulations of the use of force in Islamic law, it becomes clear that terrorist acts, such as blowing up aeroplanes, buses and trains and thus killing innocent civilians, beheadings, kidnapping journalists and humanitarian aid workers

are totally prohibited in Islam, let alone the fact that these acts are committed by clandestine organizations. Hence, the mistake of considering such terrorist acts as Islamically motivated or permitted undermines efforts to tackle this worldwide strategic problem, a fact that has recently been recognized by the British government, somewhat earlier than the USA administration.[284] First, Muslims consider these actions as attacks that distort the image of their religion. Second, and more importantly, it distracts attention from tackling the root causes of these terrorist acts, as argued in the next chapter.

In fact, a few Western scholars and governments have recognized the importance of consulting the sharīʿah and Muslim scholars as valuable sources in the fight against terrorism,[285] a historic and strategic shift in the West's long-held view that Islam breeds violence. David Aaron Schwartz concludes that "The *Shari'ah* provides a genuine, workable framework for countering international terrorism… Islamic law coordinates, integrates and legislates against that which Western jurists

[284] It is interesting to note here that George W. Gawrych, U.S. Army Command and General Staff College, warns the West in his conclusion that: "Perversions of Islam by Muslim radicals to justify their acts of terrorism against innocent civilians must not prevent the West from admiring the Islamic religion and its rich traditions. Otherwise, the terrorists will have gained a victory in the propaganda war", George W. Gawrych, "Jihad, War, and Terrorism", available from http://smallwarsjournal.com/documents/gawrych.pdf; Internet; accessed 21 March 2009, p. 20.

[285] See David Aaron Schwartz, "International Terrorism and Islamic Law", *Columbia Journal of Transnational Law*, Vol. 29, 1991, pp. 629-652. Schwartz advocates that "The *Shari'ah* may be used to condemn international terrorism-at least indirectly-in its principles on international conventions, war, neutrality and forbidden acts." Schwartz, "International Terrorism and Islamic Law", p. 650. Yassin El-Ayouty concludes that "all forms of terrorism are, under Islamic law capital offences and their perpetrators are renegades or heretics… The invocation of Islamic law would constitute a powerful tool in the delegitimization of the Islamic framework within which Muslim terrorists operate and raise funds. It also denies them the competitive advantage in the recruitment of new adherents. The invocation of Islamic law would be of considerable help in the areas of extradition, prosecution and punishment of Muslim terrorists." El-Ayouty, "International Terrorism Under the Law", p. 491; see also Ahmad E. Nassar, "The International Criminal Court and the Applicability of International Jurisdiction under Islamic Law", *Chicago Journal of International Law*, Vol. 4, No. 2, 2003, p. 592; Copinger-Symes, "Is Osama bin Laden's '*Fatwa* Urging *Jihad* against Americans' dated 23 February 1998 Justified y Islamic Law?", p. 214; Ali Ahmad, "The Role of Islamic Law in the Contemporary World Order", *Journal of Islamic Law and Culture*, Vol. 6, 2001, p. 166. Sherman A. Jackson concludes that "encourag[ing] a more informed comparison between Islamic and American legal approaches… might point the way to possible avenues of cooperation in a mutually shared interest in a safer, better world." Sherman A. Jackson, "Domestic Terrorism in the Islamic Legal Tradition", *The Muslim World*, Vol. 91, Issue 3-4, September 2001, p. 306.

have so far failed to control. The *Shari'ah* is a resource the West must no longer overlook."[286] To mention an example, the USA had already overlooked the role of Islamic law before Schwartz published these words. Unfortunately, it apparently ignored the advice of Judge Christopher Gregory Weeramantry, Judge of the International Court of Justice (1991-2000), to the USA Task Force handling the hostage crisis in Iran to research Islamic law regarding this issue. Judge Weeramantry explains that had the USA authorities cited the immunity granted to diplomats under Islamic law, it would have helped to resolve that crisis.[287]

The denunciation by Muslim religious authorities of terrorist acts as Islamically forbidden could help to curb the phenomenon of terrorism[288] and convince some of the perpetrators that what they are doing is strictly prohibited according to the dictates of their religion. In fact, some projects have already been established for this purpose by Muslim and Western governments. In conclusion, Islam is, and effectively can be, a part of the solution, and the problem should not be complicated by the accusations, made by some, that it is to blame for a complex phenomenon with political, regional and historical dimensions.

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[286] Schwartz, "International Terrorism and Islamic Law", p. 652.

[287] Weeramantry, *Islamic Jurisprudence*, p. 166. See also on the role Islamic law could have played in resolving the American hostage crisis in Iran, Ahmad, "The Role of Islamic Law", p. 160. On the prohibition of the seizure and detention of American hostages in Tehran under Islamic law, see Bassiouni, "Protection of Diplomats under Islamic Law", pp. 609-633.

[288] See El-Ayouty, "International Terrorism under the Law", p. 497. Here Major T.R. Copinger-Symes, British Army, writes: "We [in the West] must also continue to stress that bin Laden's actions run entirely counter to the *jus in bello* of *jihad* doctrine, as well as International Law. This must be used to undercut his credibility by calling into question his understanding of Islamic Law. The only way this can be done effectively is by Islamic leaders who have the theological credentials to do so. They must continually stress that the murder of on-combatants is inimical to Islam. This is not an area in which the West can play a leading role." See Copinger-Symes, "Is Osama bin Laden's '*Fatwa* Urging *Jihad* against Americans' dated 23 February 1998 Justified y Islamic Law?", pp. 229 f.

# CHAPTER FIVE

# INTERNAL HOSTILITIES AND TERRORISM

## 5.1 Introduction

The Muslims' *hijrah* (flight) from Mecca to Medina in 622 provided the first opportunity for Muslims to enjoy freedom of religion as a community and to be able to face the common challenges confronting them. Thus, it is no wonder that this incident marks the beginning of the Islamic calendar, which is called in Arabic *al-taqwīm al-hijrī* (the *hijrī* calendar).[1] After the Prophet's arrival in Medina, he founded a state in this oasis and referred in the Constitution of Medina to some of the economic, judiciary and military aspects of this state. No less importantly, this Constitution makes both the Muslim and non-Muslim citizens of this state, particularly the Jewish community, one single *ummah* (nation) and stipulates that both the Jews and the Muslims should defend Medina in the face of any foreign aggression (see Chapter One). It should be added here that there are no reports of internal hostilities taking place between the Muslims during the Prophet's lifetime.

On the day after the Prophet's demise in 11/632, a group of the leading figures in the Muslim community, later to be called in Islamic jurisprudence *ahl al-ḥall wa al-ʿaqd*, gathered in a place called Saqīfah Banī Sāʿidah to choose the head of state who would succeed the Prophet. After some deliberations and negotiations, they chose Abū Bakr (d. 13/634).[2] Abū Bakr's early challenge was to deal with the first instance of domestic war between Muslims in the history of Islam. But what is

[1] See John L. Esposito, *Unholy War: Terror in the Name of Islam* (Oxford: Oxford University Press, 2002), p. 31.

[2] See, for example, ʿAbd al-Raḥman ibn Khaldūn**,** *Tārīkh Ibn Khaldūn: Al-Musammā Dīwān al-Mubtadā' wa al-Khabar fī Tārīkh al-ʿArab wa al-Barbar wa man ʿĀṣarahum min Dhawī al-Sha'n al-Akbar*, ed. Khalīl Shiḥādah (Beirut: Dār al-Fikr, 2000/1421), Vol. 2, pp. 487-489; ʿAbd Allah ibn Muslim ibn Qutaybah, *Al-Imāmah wa al-Siyāsah*, ed. Khalīl al-Manṣūr (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1997/1418), Vol. 1, pp. 8-20; Muḥammad ibn ʿAbd Allah ibn al-ʿArabī, *Aḥkām al-Qur'ān*, ed. Muḥammad ʿAbd al-Qādir ʿAṭā, 3rd ed. (Beirut: Dār al-Kutub al-ʿIlmiyyah, 2002/1424), Vol. 2, pp. 416 f.

also important here is that, since the establishment by the Prophet of a state in Medina, Muslims remained politically unified by an Islamic identity under one or more leaders in one form or another until the abolition of the Caliphate on 3 March 1924.[3] According to the jurists, the main duties of the Muslim head of state include the protection of the religion of Islam and the interests of the nation, as well as the initiation of war.[4] Hence, Muslim jurists agree that appointing a head of state is a *farḍ kifāyah* (a collective duty on the Muslim nation).[5]

On the basis of specific precedents in the early Islamic history, jurists give four methods for choosing the head of state: first, choosing the head of state by *ahl al-ḥall wa al-ʿaqd* and the general public, following the precedent of the appointment of the first caliph, Abū Bakr (r. 632-634); second, designation of the head of state by his predecessor, on the basis of Abū Bakr's designation of his successor, the second caliph ʿUmar ibn al-Khaṭṭāb (r. 634/644); third, choosing the head of state from a number of candidates nominated by the previous head of state, as happened in the

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[3] On the abolition of the Caliphate see, Ahmed Mohsen al-Dawoody, "The Intellectual Repercussions of the Abolition of the Caliphate in Egypt" (M.A. thesis, Leiden University, 1999).

[4] ʿAlī ibn Muḥammad ibn Ḥabīb al-Māwardī, *Kitāb al-Aḥkām al-Sulṭāniyyah wa al-Wilāyāt al-Dīniyyah*, ed. Aḥmad Mubārak al-Baghdādī (Kuwait: Maktabah Dār ibn Qutaybah, 1989/1409), pp. 22-24; Muḥammad Rashīd Riḍā, *Al-Khilāfah* (Cairo: Al-Zahrā' Lil-Iʿlām al-ʿArabī, n.d.), pp. 35-37; Manṣūr ibn Yūnus ibn Idrīs al-Buhūtī, *Kashshāf al-Qināʿ ʿan Matn al-Iqnāʿ*, ed. Hilāl Miṣīlḥī Muṣṭafā Hilāl (Beirut: Dār al-Fikr, 1981-2/1402), Vol. 6, pp. 160 f.; Muṣṭafā al-Suyūṭī al-Rahaybānī, *Maṭālib Ulī al-Nuhā fī Sharḥ Ghāyah al-Muntahā* (Damascus: Al-Maktab al-Islāmī, 1961), Vol. 6, pp. 260 f.; Patricia Crone and Martin Hinds, *God's Caliph: Religious Authority in the First Centuries of Islam*, University of Cambridge Oriental Publication No. 37 (Cambridge: Cambridge University Press, 1986), pp. 43-57; al-Dawoody, "The Abolition of the Caliphate", p. 30.

[5] See, for example, Muḥammad al-Khaṭīb al-Shirbīnī, *Al-Iqnāʿ fī Ḥall al-Fāẓ Abī Shujāʿ*, ed. Maktab al-Buḥūth wa al-Dirasāt (Beirut: Dār al-Fikr, 1994-5/1415), Vol. 2, p. 549; al-Māwardī, *Al-Aḥkām al-Sulṭāniyyah*, p. 4; Muḥammad ibn Abī al-ʿAbbās Aḥmad ibn Ḥamzah al-Ramlī, *Nihāyah al-Muḥtāj ilā Sharḥ al-Minhāj* (Beirut: Dār al-Fikr, 1984/1404), Vol. 7, p. 409; Zakariyyā ibn Muḥammad ibn Aḥmad ibn Zakariyyā al-Anṣārī, *Asnā al-Maṭālib fī Sharḥ Rawḍ al-Ṭālib*, ed. Muḥammad Muḥammad Tāmir (Beirut: Dār al-Kutub al-ʿIlmiyyah, 2000/1422), Vol. 4, p. 108; ʿAbd al-Ḥamīd al-Shirwānī, *Ḥawāshī al-Shirwānī ʿalā Tuḥfah al-Muḥtāj bi-Sharḥ al-Minhāj* (Beirut: Dār al-Fikr, n.d.), Vol. 9, p. 74; al-Rahaybānī, *Maṭālib*, Vol. 6, pp. 263 f.; ʿAbd al-Raḥman ibn ʿAbd Allah al-Baʿlī, *Kashf al-Mukhaddarāt wa al-Riyāḍ al-Muzhirāt li-Sharḥ Akhṣar al-Mukhtaṣarāt*, ed. Muḥammad ibn Nāṣir al-ʿAjamī (Beirut: Dār al-Bashā'ir al-Islāmiyyah, 2002/1423), Vol. 2, p. 774; Riḍā, *Al-Khilāfah*, p. 18; Yūsuf al-Qaraḍāwī, *Fiqh al-Jihād: Dirāsah Muqāranah li-Aḥkāmih wa Falsafatih fī Ḍaw' al-Qur'ān wa al-Sunnah* (Cairo: Maktabah Wahbah, 2009), Vol. 2, p. 977; David De Santillana, "Law and Society", in Thomas Arnold and Alfred Guillaume, eds., *The Legacy of Islam* (Oxford: Clarendon Press, 1931), p. 295.

case of the appointment of the third caliph, ʿUthmān ibn ʿAffān (r. 644-656), who was chosen from among six candidates nominated by the second caliph; and, more importantly here, fourth, the usurpation of power or *coup d'état*, for which the precedent is the coup by ʿAbd al-Malik ibn Marwān (r. 685-705) against ʿAbd Allah ibn al-Zubayr[6] (d. 73/692), who was killed in battle in 73/692.[7]

On the one hand, the jurists agree that, once a head of state is chosen or successfully manages to establish himself as the ruler, even through usurpation and the use of force, then obedience to him becomes an obligation and rebellion against him is impermissible.[8] Here, the Qur'ān (4:59) and several ḥadīths are quoted in support of obedience to the established ruler and prohibition of rebellion against him.[9] On the other hand, on the basis of the same Qur'ānic verse (4:59) and ḥadīth,

[6] See, for example, Ibn ʿĀbidīn, *Ḥāshiyah Radd al-Muḥtār*, Vol. 4, p. 263; al-Anṣārī, *Asnā al-Maṭālib*, Vol. 4, pp. 109 f.; al-Shirbīnī, *Al-Iqnāʿ*, Vol. 2, p. 550; al-Shirwānī, *Ḥawāshī al-Shirwānī*, Vol. 9, pp. 76-79; Aḥmad al-Ṣāwī, *Bulghah al-Sālik li-Aqrab al-Masālik*, ed. Muḥammad ʿAbd al-Salām Shāhīn (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1995/1414), Vol. 4, p. 220; Muḥammad ʿAllīsh, *Minaḥ al-Jalīl Sharḥ ʿalā Mukhtaṣar Sayyid Khalīl* (Beirut: Dar al-Fikr, 1989/1409), Vol. 9, p. 196; al-Buhūtī, *Kashshāf al-Qināʿ*, Vol. 6, p. 159; al-Rahaybānī, *Maṭālib*, Vol. 6, pp. 263 f.; Riḍā, *Al-Khilāfah*, pp. 41-46; ʿAbd al-Qādir ʿAwdah, *Al-Tashrīʿ al-Jināʾī al-Islāmī: Muqāranā bi-al-Qānūn al-Waḍʿī* (Beirut: Dār al-Kitāb al-ʿArabī, n.d.), Vol. 2, pp. 676 f.; Muḥammad Saʿīd Ramaḍān Al-Būṭī, *Al-Jihād fī Al-Islām: Kayf Nafhamuh? Wa Kayf Numārisuh?*, 5th ed. (Damascus: Dār al-Fikr, 2006/1427), p. 148; Ann K.S. Lambton, *State and Government in Medieval Islam: An Introduction to the Study of Islamic Political Theory: The Jurists*, London Oriental Series, Vol. 36 (Oxford: Oxford University Press, 1981), p. 18; al-Dawoody, "The Abolition of the Caliphate", p. 31; Josef Van Ess, "Political Ideas in Early Islamic Religious Thought", *British Journal of Middle Eastern Studies*, Vol. 28, No. 2, Nov., 2001, pp. 156 f.

[7] Shams al-Dīn Muḥammad ibn Aḥmad ibn ʿUthmān al-Dhahabī, *Al-ʿIbar fī Khabar man Ghabar*, ed. Ṣalāḥ al-Dīn al-Munjid, 2nd ed. (Kuwait: Maṭbaʿah Ḥukūmah al-Kuwait, 1984), Vol. 1, p. 82; H.A.R. Gibb, "ʿAbd Allāh b. al-Zubayr", *Encyclopaedia of Islam*, New ed., Vol. I, pp. 54 f.; H.A.R. Gibb, "ʿAbd al-Malik b. Marwān", *Encyclopaedia of Islam*, New ed., Vol. I, pp. 76 f.

[8] See, for example, Muḥammad Amīn ibn ʿUmar ibn ʿĀbidīn, *Ḥāshiyah Radd al-Muḥtār ʿalā al-Durr al-Mukhtār: Sharḥ Tanwīr al-Abṣār Fiqh Abū Ḥanīfah* (Beirut: Dār al-Fikr, 2000/1421), Vol. 4, pp. 264 f.; Muḥammad ibn ʿAbd al-Wahhāb, *Mukhtaṣar al-Inṣāf wa Al-Sharḥ al-Kabīr*, ed. ʿAbd al-ʿAzīz ibn Zayd al-Rūmī, Muḥammad Biltājī and Sayyid Ḥijāb (Riyadh: Maṭābiʿ al-Riyādh, n.d.), p. 723; Aḥmad ibn ʿAbd al-Ḥalīm ibn Taymiyyah, *Al-Khilāfah wa al-Mulk*, Min Rasāʾil Shaykh al-Islām Ibn Taymiyyah 4, ed. Ḥammād Salāmah and Muḥammad ʿĪwīḍah, 2nd ed. (Al-Zarqāʾ, Jordan: Maktabah al-Manār, 1994/1414), pp. 9-12; Majid Khadduri, *War and Peace in the Law of Islam* (Baltimore, MD.: Johns Hopkins University Press, 1955), p. 78; Muḥammad Ḥammīdullāh, *Muslim Conduct of State: Being a Treatise on Siyar, That is Islamic Notion of Public International Law, Consisting of the Laws of Peace, War and Neutrality, Together with Precedents from Orthodox Practice and Preceded by a Historical and General Introduction*, rev. & enl. 5th ed. (Lahore: Sh. Muhammad Ashraf, 1968), p. 184; Lambton, *State and Government in Medieval Islam*, p. 19.

[9] See, for example, ḥadīths numbers 6659, 6660, 6723, 6724, 6725 and 6726 in Muḥammad ibn Ismāʿīl al-Bukhārī, *Al-Jāmiʿ al-Ṣaḥīḥ al-Mukhtaṣar*, ed. Muṣṭafā Dīb al-Baghā, 3rd ed. (Damascus; Beirut: Dār ibn Kathīr, 1987/1407), Vol. 6, pp. 2591 f., 2612; ḥadīth number 1844 in Muslim ibn al-

Muslims are unanimous that a command contrary to the dictates of the sharīʿah is not to be obeyed.[10] According to a ḥadīth: "There is no obedience to a human being in a [matter which involves] disobedience to Almighty God."[11]

This chapter will consider the various kinds of internal hostilities referred to in Islamic law in order to answer the following questions: (1) does Islamic law, on the one hand, give the Islamic state authorities the right to use force against its citizens if they disobey the commands issued by the authorities or, generally, in any other cases? The answer to this question will indicate the degree of in/tolerance the Islamic government should show in dealing with its opponents. On the other hand, (2) does Islamic law permit Muslims to rebel against the ruler/s of the Islamic state and to use force to change their government if, for example, they are ordered to comply with a command contrary to the dictates of Islam or, generally, in any other cases? If the answer to any of these questions is in the affirmative, then (3) what are the justifications of both the Islamic state authorities and its citizens for the resort to

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Ḥajjāj al-Qushayrī, *Ṣaḥīḥ Muslim*, ed. Muḥammad Fū'ād ʿAbd al-Bāqī (Beirut: Dār Iḥyā' al-Turāth al-ʿArabī, n.d.), Vol. 3, p. 1472; ḥadīths numbers 2680 and 2681 in Muḥammad ibn Yazīd ibn Mājah, *Sunan Ibn Mājah*, ed. Muḥammad Fū'ād ʿAbd al-Bāqī (Beirut: Dār al-Fikr, n.d.), Vol. 2, p. 995; ḥadīths numbers 7815, 7816 and 7818 in Aḥmad ibn Shuʿayb al-Nasā'ī, *Sunan al-Nasā'ī al-Kubrā*, ed. ʿAbd al-Ghaffār Sulaymān al-Bindarī and Sayyid Kasrawī Ḥasan (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1991/1411), Vol. 4, pp. 431 f.; Ibrāhīm ibn ʿAlī ibn Yūsuf al-Shirāzī, *Al-Muhadhdhab: fī Fiqh al-Imām al-Shāfiʿī*, ed. Zakariyyā ʿImīrat (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1995/1416) Vol. 3, p. 249; Muḥammad al-Khaṭīb al-Shirbīnī, *Mughnī al-Muḥtāj ilā Maʿrifah Maʿānī Alfāẓ al-Minhāj* (Beirut: Dār al-Fikr, n.d.), Vol. 4, p. 124; ʿAwdah, *Al-Tashrīʿ al-Jinā'ī al-Islāmī*, Vol. 2, pp. 671-673; Ḥammīdullāh, *Muslim Conduct of State*, p. 184; Abdulrahman Muhammad Alsumaih, "The Sunni Concept of Jihad in Classical Fiqh and Modern Islamic Thought" (PhD thesis, University of Newcastle Upon Tyne, 1998), p. 91 .

[10] Ibn Taymiyyah, *Al-Khilāfah wa al-Mulk*, p. 12; Muḥammad Rashīd Riḍā, *Tafsīr al-Qur'ān al-Ḥakīm: Al-Shahīr bi-Tafsīr al-Manār*, 2nd ed. (Cairo: Dār al-Manār, 1947-8/1367), Vol. 6, p. 367; Muḥammad Abū Zahrah, *Al-Jarīmah wa al-ʿUqūbah fī al-Fiqh al-Islāmī: al-Jarīmah* (Cairo: Dār al-Fikr al-ʿArabī, 1998), p. 130; ʿAwdah, *Al-Tashrīʿ al-Jinā'ī al-Islāmī*, Vol. 2, pp. 675 f.; Ḥammīdullāh, *Muslim Conduct of State*, pp. 184 f.; Bernard Lewis, *Islam in History: Ideas, Men and Events in the Middle East* (London: Alcove Press, 1973), p. 256; Lambton, *State and Government in Medieval Islam*, pp. 19, 313; Khaled Abou El Fadl, "Political Crime in Islamic Jurisprudence and Western Legal History", *U.C. Davis Journal of International Law & Policy*, Vol. 4, No. 1, Winter 1998, pp. 11, 14.

[11] See, for example, ḥadīth number 1065 in Aḥmad ibn Ḥanbal, *Musnad al-Imām Aḥmad Ibn Ḥanbal* (Cairo: Mu'assasah Qurṭubah, n.d.), Vol. 1, p. 129; ḥadīth number 279 in Aḥmad ibn ʿAlī ibn al-Muthannā, *Musnad Abī Yaʿlā*, ed. Ḥusayn Salīm Asad (Damascus: Dār al-Ma'mūn lil-Turāth, 1984/1404), Vol. 1, p. 241; ḥadīths numbers 33709 and 33710 in ʿAbd Allah ibn Muḥammad ibn Abī Shaybah, *Al-Kitāb al-Muṣannaf fī al-Aḥādīth wa al-Āthār*, ed. Kamāl Yūsuf al-Ḥūt (Riyadh: Maktabah al-Rushd, 1988-9/1409), Vol. 6, p. 544.

war against each other? (4) What are the Islamic laws that regulate the conduct of both the Islamic state army and the rebels during war? (5) To what extent do these laws that regulate the conduct of Muslims during such a domestic war differ from the laws that regulate the conduct of the Islamic state in international armed conflicts, i.e., war with the *dār al-ḥarb*, discussed in Chapter Four? After examining the Islamic justifications for the use of force and the laws that regulate the conduct of Muslims in both international and internal conflicts, this study will investigate (6) whether the classical Muslim jurists treat the issues of international and domestic terrorism or not? If the answer is yes, then (7) what constitutes an act of terrorism according to Islam? And, last but not least, (8) what is the punishment for terrorists and their accomplices under Islamic law?

### 5.2 Internal Hostilities

Classical Muslim jurists treat four different kinds of internal hostilities: (1) Fighting against *al-bughāh* (rebels, secessionists); (2) fighting against *al-muḥāribūn*/*quṭṭāʿ al-ṭarīq* (bandits, highway robbers, pirates); (3) fighting against *ahl al-riddah* (apostates) and (4) fighting against *al-khawārij* (roughly, violent religious fanatics).[12] Rulings concerning the use of force against *bughāh* and *muḥāribūn* are based on the Qur'ān and, probably partly for this reason, are discussed in somewhat more detail compared to the other two kinds of internal hostilities – mentioned by the jurists only in passing – which are based on certain precedents in the first four decades after the Prophet's demise. Clearly the attention paid by the jurists to the first two kinds of war is due particularly to the potential harm such hostilities cause to the stability and

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[12] Depending on al-Māwardī, both Majid Khadduri and Abou El Fadl omit war against *al-khawārij* from this list of the four kinds of internal conflicts (domestic jihād) treated by the classical Muslim jurists, see Khadduri, *War and Peace*, p. 74; Abou El Fadl, *Rebellion and Violence*, p. 32. See al-Māwardī, *Al-Aḥkām al-Sulṭāniyyah*, pp. 74-87.

security of the Muslim community. Therefore, the use of force against *bughāh* and *muḥāribūn* are the subject of discussion in this chapter, first, because they satisfy the purposes of this study and, second, because they are the principal kinds of domestic armed conflicts treated in Islamic law.

Concerning war against apostates, some jurists refer to fighting against apostate groups because of the unique incidents of fighting waged by the first caliph against certain Arab tribes who refused to pay *zakāh* shortly after the Prophet's demise.[13] It should be added here that these tribes did not renounce Islam, but, on the basis of their interpretation of a certain Qur'ānic pronouncement (9:103), argued that after the Prophet's demise they were no longer bound to pay *zakāh*.[14] Concerning fighting against apostates, al-Shāfiʿī briefly states that, if a group apostatizes and engages in fighting, then the laws of war against *ahl al-ḥarb*, i.e., international wars, apply to them.[15]

As for war against *al-khawārij*, the word *al-khawārij* refers to a group of Muslims who emerged during the reign of the fourth caliph, ʿAlī ibn Abī Ṭālib (r. 656-661). They are defined by the jurists as a group of Muslims who believed it to be permissible to attack the lives and property of not only Muslim rulers, but also ordinary Muslim citizens, on the basis of a religious interpretation. They held that some of the Companions of the Prophet and Muslims who committed a major sin were unbelievers. As for the rules of fighting against them, while the majority of the

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[13] See Sobhi Mahmassani, *Al-Qānūn wa al-ʿAlāqāt al-Dawliyyah fī al-Islām* (Beirut: Dār al-ʿIlm lil-Malāyīn, 1972/1392), p. 202; M. Lecker, "Al-Ridda", *Encyclopaedia of Islam*, New ed., Vol. XII, pp. 692-694; Alsumaih, "The Sunni Concept of Jihad", p. 44, 71-74. On apostasy in Islam see, Donna E. Arzt, "Heroes or Heretics: Religious Dissidents under Islamic Law", *Wisconsin International Law Journal*, Vol. 14, No. 2, Spring 1996, pp. 373-376.

[14] See, for example, Muḥammad ibn Aḥmad al-Anṣārī al-Qurṭubī, *Al-Jāmiʿ li-Aḥkām al-Qur'ān* (Cairo: Dār al-Shaʿb, n.d.), Vol. 8, p. 244; Ismāʿīl ibn ʿUmar ibn Kathīr, *Tafsīr al-Qur'ān al-ʿAẓīm* (Beirut: Dār al-Fikr, 1980-1/1401), Vol. 2, pp. 386 f.; al-Anṣārī, *Asnā al-Maṭālib*, Vol. 4, p. 112.

[15] Muḥammad ibn Idrīs al-Shāfiʿī, *Al-Umm*, 2nd ed. (Beirut: Dār al-Maʿrifah, [1973]/1393), Vol. 4, p. 222.

jurists maintain that they are to be treated as rebels, some Ḥanbalī jurists hold that they are to be treated as apostates.[16]

### 5.2.1 War against *al-Bughāh*

Literally, the noun *baghy* means injustice or transgression. Hence, the *bughāh* (sing. *bāghī*) are given this name because of their injustice and transgression,[17] which is manifested in their resort to violence in order to overthrow the ruler, secede from his rule or refuse to comply with an obligation. However, some Shāfiʿī jurists point out that the term *baghy here* is not a derogatory term. Despite the fact that their justification for rebellion is invalid from the perspective of the majority of Muslims, classical Muslim jurists explain that the *bughāh* are excused because, from the perspective of the *bughāh*, they think that their actions are justified. Moreover, the condemnation of the *bughāh* in some ḥadīths and in the opinions of some jurists applies only to those who cannot really be defined as *bughāh*, i.e., those who do not

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[16] See, for example, Zayd al-Dīn ibn Najīm, *Al-Baḥr al-Rā'iq Sharḥ Kanz al-Daqā'iq*, 2nd ed. (Beirut: Dār al-Maʿrifah, n.d.) Vol. 5, p. 151; Ibn ʿĀbidīn, *Ḥāshiyah Radd al-Muḥtār*, Vol. 4, p. 262; Zakariyyā ibn Muḥammad ibn Aḥmad ibn Zakariyyā al-Anṣārī, *Manhaj al-Ṭullāb* (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1997-8/1418), p. 123; ʿAlī ibn Sulaymān al-Mirdāwī, *Al-Inṣāf fī Maʿrifah al-Rājiḥ min al-Khilāf 'alā Madhhab al-Imām Aḥmad Ibn Ḥanbal*, ed. Muḥammad Ḥamid al-Fiqī (Beirut: Dār Iḥyā' al-Turāth al-ʿArabī, n.d.), Vol. 10, p. 310; Muwaffaq al-Dīn ʿAbd Allah ibn Aḥmad ibn Qudāmah, *Al-Mughnī: fī Fiqh al-Imām Aḥmad Ibn Ḥanbal al-Shaybānī* (Beirut: Dār al-Fikr, 1984-5/1405), Vol. 9, pp. 3 f., al-Buhūtī, *Kashshāf al-Qināʿ*, Vol. 6, p. 161; ʿAlī ibn Aḥmad ibn Saʿīd ibn Ḥazm, *Al-Muḥallā* (Beirut: Dār al-Āfāq al-Jadīdah, n.d.), Vol. 11, p. 97; Abū Zahrah, *Al-Jarīmah*, p. 126; ʿAwdah, *Al-Tashrīʿ al-Jinā'ī al-Islāmī*, Vol. 2, pp. 682-684; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 1, pp. 200 f., Vol. 2, pp. 998-1001; Ḥammīdullāh, *Muslim Conduct of State*, p. 177; Tamara Sonn, "Irregular Warfare and Terrorism in Islam: Asking the Right Questions", in James Turner Johnson and John Kelsay, eds., *Cross, Crescent, and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (New York: Greenwood, 1990), pp. 135 f.; Arzt, "Heroes or Heretics", pp. 376-378; Alsumaih, "The Sunni Concept of Jihad", pp. 47, 80-86; Muhammad Hashim Kamali, *Freedom of Expression in Islam*, rev. ed. (Cambridge: Islamic Texts Society, 1997), pp. 197-201; Abou El Fadl, "Political Crime in Islamic Jurisprudence", p. 13; Esposito, *Unholy War*, pp. 41-43.

[17] See Muḥyī al-Dīn ibn Sharaf al-Nawawī, *Al-Majmūʿ: Sharḥ al-Muhadhdhab*, ed. Maḥmūd Maṭrajī (Beirut: Dār al-Fikr, 2000), Vol. 20, p. 337; al-Shirbīnī, *Al-Iqnāʿ*, Vol. 2, p. 547; al-Shirbīnī, *Mughnī al-Muḥtāj*, Vol. 4, p. 123; al-Anṣārī, *Asnā al-Maṭālib*, Vol. 4, p. 111; al-Baʿlī, *Kashf al-Mukhaddarāt*, Vol. 2, p. 774; Mahmassani, *Al-Qānūn wa al-ʿAlāqāt*, 197; Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law*, paperback ed. (Cambridge: Cambridge University Press, 2006), p. 37.

have a just cause, power or leadership.[18] Put differently, Ibn Taymiyyah (d. 728/1328) adds that the term *bughāh* does not mean that the rebels have committed a sin, or that they are sinners, but fighting against them is permitted in order to prevent their harm (*li-dafʻ ḍararihim*) to security and stability.[19] Nonetheless, according to Khaled Abou El Fadl "the traditional Ḥanafī position maintained that the rebels are sinners while the traditional Ḥanbalī view disagreed."[20]

The technical definitions given by the jurists of the four schools identify the *bughāh* as:

> a group of Muslims that possesses some power and organization (*shawkah*, *manʻah*, *fay'ah*) and that gathers, under the command of a leader, to fight against a just ruler claiming, whether rightly or wrongly, that they have a *ta'wīl* (just cause, plausible interpretation) for their rebellion, secession or non-compliance with an obligation.[21]

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[18] Al-Anṣārī, *Asnā al-Maṭālib*, Vol. 4, p. 112; al-Shirbīnī, *Mughnī al-Muḥtāj*, Vol. 4, p. 124; al-Ramlī, *Nihāyah al-Muḥtāj*, Vol. 7, p. 402; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 2, pp. 1016 f.

[19] Ibn Taymiyyah, *Al-Khilāfah wa al-Mulk*, p. 89.

[20] Abou El Fadl, *Rebellion and Violence*, p. 238.

[21] See, for example, Ibn Najīm, *Al-Baḥr al-Rā'iq*, Vol. 5, p. 151; ʻAbd Allah ibn Maḥmūd ibn Mawdūd, *Al-Ikhtiyār li-Taʻlīl al-Mukhtār*, ed. ʻAbd al-Laṭīf Muḥammad ʻAbd al-Raḥman, 3rd ed. (Beirut: Dār al-Kutub al-ʻIlmiyyah, 2005/1426), Vol. 4, p. 160; al-Shaykh Niẓām, and a group of Indian scholars, *Al-Fatāwā al-Hindiyyah: Fī Madhhab al-Imām al-Aʻẓam Abī Ḥanīfah al-Nuʻmān* (N.p.: Dār al-Fikr, 1991/1411), Vol. 2, p. 283; Ibn ʻĀbidīn, *Ḥāshiyah Radd al-Muḥtār*, Vol. 4, p. 261; al-Nawawī, *Al-Majmūʻ*, Vol. 20, p. 337; ʻAlī ibn Muḥammad ibn Ḥabīb al-Māwardī, *Naṣīḥah al-Mulūk*, ed. Khiḍr Muḥammad Khiḍr (Al-Safah, Kuwait: Maktabah al-Falāḥ, 1983/1403), p. 254; al-Shirbīnī, *Mughnī al-Muḥtāj*, Vol. 4, p. 123; al-Anṣārī, *Manhaj al-Ṭullāb*, p. 123; Aḥmad ibn Idrīs al-Qarāfī, *Al-Dhakhīrah*, ed. Muḥammad Būkhubzah (Beirut: Dār al-Gharb al-Islāmī, 1994), Vol. 12, p. 5; Muḥammad ibn Yūsuf ibn Abī al-Qāsim al-ʻAbdarī, *Al-Tāj wa al-Iklīl: Sharḥ Mukhtaṣar Khalīl*, 2nd ed. (Beirut: Dār al-Fikr, 1977-8/1398), Vol. 6, p. 276; Muḥammad ibn Muḥammad ibn ʻAbd al-Raḥman al-Ḥaṭṭāb, *Mawāhib al-Jalīl li-Sharḥ Mukhtaṣar Khalīl*, 2nd ed. (Beirut: Dār al-Fikr, 1977-8/1398), Vol. 6, pp. 276-278; Aḥmad al-Dardīr, *Al-Sharḥ al-Kabīr*, ed. Muḥammad ʻAllīsh (Beirut: Dār al-Fikr, n.d.), Vol. 4, pp. 298 f.; ʻAllīsh, *Minaḥ al-Jalīl*, Vol. 9, p. 195; Muwaffaq al-Dīn ʻAbd Allah ibn Aḥmad ibn Qudāmah, *'Umdah al-Fiqh*, ed. ʻAbd Allah Safar al-ʻAbdalī and Muḥammad Dughaylib al-ʻUtaybī (Taif: Maktabah al-Ṭarafayn, n.d.), p. 149; Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 5; al-Mirdāwī, *Al-Inṣāf*, Vol. 10, p. 311; Manṣūr ibn Yūnus ibn Idrīs al-Buhūtī, *Al-Rawḍ al-Murbiʻ: Sharḥ Zād al-Mustaqniʻ* (Riyadh: Maktabah al-Riyadh al-Ḥadīthah, 1970-1/1390), Vol. 3, p. 335; al-Buhūtī, *Kashshāf al-Qināʻ*, Vol. 6, pp. 159, 161; Muḥammad ibn Mufliḥ, *Al-Furūʻ*, ed. Abī al-Zahrā' Ḥāzim al-Qāḍī (Beirut: Dār al-Kutub al-ʻIlmiyyah, 1997/1418), Vol. 6, p. 147; Ibrāhīm ibn Muḥammad ibn ʻAbd Allah ibn Mufliḥ, *Al-Mubdiʻ fī Sharḥ al-Muqniʻ* (Beirut: Al-Maktab al-Islāmī, 1979-80/1400), Vol. 9, p. 159; al-Rahaybānī, *Maṭālib*, Vol. 6, p. 262; Ibn Ḥazm, *Al-Muḥallā*, Vol. 11, p. 97; Muḥammad ibn ʻAlī ibn Muḥammad al-Shawkānī, *Al-Sayl al-Jarrār al-Mutadaffiq 'alā Ḥadā'iq al-Azhār*, ed. Maḥmūd Ibrāhīm Zāyid (Beirut: Dār al-Kutub al-ʻIlmiyyah, 1984-5/1405), Vol.

In fact, jurists of the different schools, and even within the same school, phrase their definitions differently and omit or emphasise one or more of the essential parts of the above definition. For example, most of the jurists stipulate that for a group to qualify as *bughāh*, they should have a leader,[22] while the Ḥanbalī jurist al-Buhūtī (d. 1051/1641) does not make this stipulation[23] and some others do not refer to it at all. Also, while some jurists define the *bughāh* as a group who fight against a just ruler, a few maintain that such a group are *bughāh* even if they fight against an unjust ruler, and others are not specific on this point. The issue here is that the varying definitions affect who do and who do not qualify as *bughāh* and hence the treatment they should receive, as discussed below.

A few jurists confuse the *bughāh* with the *khawārij*,[24] but one of the main differences between them is that the *bughāh* fight only against the ruler and his army, unlike the *khawārij*, who indiscriminately attack all Muslims, civilians or otherwise.[25] This confusion is presumably caused by the similarities in the historical circumstances in which these two categories originated, since they both arose during the reign of the fourth caliph. Indeed, certain precedents in early Islamic history serve as one of the main sources for discussion of both international and internal conflicts in Islam. Al-Shāfiʿī illustrates this point when he indicates that he derived the rules for fighting against polytheists from the Prophet, rules for fighting against apostates from Abū Bakr and rules for fighting against rebels from ʿAlī ibn Abī

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4, p. 558; Abū Zahrah, *Al-Jarīmah*, pp. 125 f.; ʿAwdah, *Al-Tashrīʿ al-Jināʾī al-Islāmī*, Vol. 2, p. 674; ʿAbd al-Qādir ʿAwdah, *Criminal Law of Islam*, trans. Zakir Aijaz (New Delhi: Kitab Bhavan, reprint 2005), Vol. I, pp. 113 f.; F.A. Klein, *The Religion of Islam*, 1st paperback ed. (London: Curzon Press, 1985), p. 182.

[22] See, for example, al-Nawawī, *Al-Majmūʿ*, Vol. 20, pp. 348 f.; al-Shirbīnī, *Al-Iqnāʿ*, Vol. 2, p. 547; al-Mirdāwī, *Al-Inṣāf*, Vol. 10, p. 312; Ibn Mufliḥ, *Al-Furūʿ*, Vol. 6, p. 147; ʿAwdah, *Al-Tashrīʿ al-Jināʾī al-Islāmī*, Vol. 2, p. 680.

[23] Al-Buhūtī, *Al-Rawḍ al-Murbiʿ*, Vol. 3, p. 335.

[24] See, for example, ʿAlā al-Dīn al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ fī Tartīb al-Sharāʾiʿ*, 2nd ed. (Beirut: Dār al-Kitāb al-ʿArabī, 1982), Vol. 4, p. 140; Yūsuf ibn ʿAbd al-Barr, *Al-Kāfī fī Fiqh Ahl al-Madīnah* (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1986-7/1407), p. 222.

[25] Ibn Najīm, *Al-Baḥr al-Rāʾiq*, Vol. 5, p. 151; Abū Zahrah, *Al-Jarīmah*, p. 126.

Ṭālib.[26] The importance of these early precedents is particularly clear when it comes to the law of rebellion, more than any of the other forms of armed conflict discussed in Islamic law.

However, with regard to the scriptural basis for the law of rebellion, the jurists refer only to the following verse:

> And if two parties of the believers fight each other, then bring reconciliation between them. And if one of them transgresses against the other, then fight against the one who transgresses until it returns to the ordinance of God. But if it returns, then bring reconciliation between them according to the dictates of justice and be fair. Indeed God loves those who are fair.[27]

According to the *Tafsīr* literature, exegetes explain that the occasion of revelation of this verse relates to one of two brawls or fights between a handful of Muslim individuals using hands, sticks and shoes.[28] Apparently, no casualties were reported in either of these two incidents. The interesting point here is that this verse, which relates to such a small incident, serves as the scriptural basis for rulings on rebellion, secession and war between Muslim countries. In fact, this is the verse upon which Muslim scholars advocate that it is permissible for Muslim countries to go to war against Iraq – another Muslim country – in order to liberate Kuwait from the Iraqi

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[26] See al-Nawawī, *Al-Majmūʿ*, Vol. 20, p. 337; al-Shirbīnī, *Mughnī al-Muḥtāj*, Vol. 4, p. 123; ʿAlī ibn Muḥammad ibn Ḥabīb al-Māwardī, *Al-Ḥāwī al-Kabīr: Fī Fiqh Madhhab al-Imām al-Shāfiʿī Raḍī Allah ʿanh wa huwa Sharḥ Mukhtaṣar al-Muznī*, ed. ʿAlī Muḥammad Muʿawwaḍ and ʿĀdil Aḥmad ʿAbd al-Mawjūd (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1999), Vol. 13, p. 104; al-Ramlī, *Nihāyah al-Muḥtāj*, Vol. 7, p. 402.

[27] Qur'ān 49:9.

[28] See, for example, Muḥammad ibn Jarīr al-Ṭabarī, *Jāmiʿ al-Bayān ʿan Ta'wīl Āy al-Qur'ān* (Beirut: Dār al-Fikr, 1984-5/1405), Vol. 26, pp. 127-129; Ibn Kathīr, *Tafsīr*, Vol. 4, p. 212; al-Qurṭubī, *Al-Jāmiʿ*, Vol. 16, pp. 315 f.; Naṣr ibn Muḥammad ibn Aḥmad Abū al-Layth al-Samarqandī, *Tafsīr al-Samarqandī al-Musammā Baḥr al-ʿUlūm*, ed. Maḥmūd Maṭrajī (Beirut: Dār al-Fikr, n.d.), Vol. 3, pp. 309 f.; Jalāl al-Dīn al-Suyūṭī, *Al-Durr al-Manthūr* (Beirut: Dār al-Fikr, 1993), Vol. 7, pp. 560 f.; ʿAbd al-Rāziq ibn Hammām al-Ṣanaʿānī, *Tafsīr al-Qur'ān*, ed. Muṣṭafā Muslim Muḥammad (Riyadh: Maktabah al-Rushd, 1980-1/1401), Vol. 3, p. 232; Aḥmad Muṣṭafā al-Marāghī, *Tafsīr al-Marāghī* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1946/1365), Vol. 26 p. 130.

invasion (August 1990- February 1991).[29] This doubtless exemplifies the jurists' tendency to regulate their contexts according to the Qur'ānic injunctions addressing such or similar contexts.

It is worth adding here that jurists of the different schools treat the law of rebellion under different chapters: The Ḥanafī[30] jurists treat it under the chapters of *Siyar* or *Jihād*, while the Shāfiʿīs[31] treat it as a separate chapter. Surprisingly, both the Mālikī[32] and Ḥanbalī[33] jurists treat it under the chapter of *Ḥudūd*. *Ḥudūd* (sing. *ḥadd*) refers to the category of punishments for crimes specifically prescribed in the Qur'ān or the ḥadīth. *Ḥudūd* crimes fall under the category of God's rights, i.e., society's rights.[34] Thus, it is surprising that, some of the Mālikī and Ḥanbalī jurists,

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[29] Muḥammad Sayyid Ṭanṭāwī, "Al-Ḥukm al-Sharʿī fī Aḥdāth al-Khalīj", *The Islamic Fiqh Council Journal*, Issue No. 5, [1991/1411], pp. 68-73; Aḥmad ʿUmar Hāshim, "Ma'sāh al-Ghazw al-ʿIrāqī wa Wājib al-ʿArab wa al-Muslimīn", *The Islamic Fiqh Council Journal*, Issue No. 5, [1991/1411], p. 104; Ḥusayn Ḥāmid Hassān, "Ḥukm al-Sharīʿah fī Ghazw al-Irāq lil-Kuwayt", *The Islamic Fiqh Council Journal*, Issue No. 5, [1991/1411], pp. 191-193.

[30] See, for example, ʿAlā' al-Dīn Al-Samarqandī, *Tuḥfah al-Fuqahā'* (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1984/1405), Vol. 3, pp. 293-315; al-Kāsānī, *Badā'i' al-Ṣanā'i'*, Vol. 7, pp. 97-142; Ibn Mawdūd, *Al-Ikhtiyār*, Vol. 4, pp. 124-163; Ibn Najīm, *Al-Baḥr al-Rā'iq*, Vol. 5, pp. 76-155; al-Shaykh Niẓām, *Al-Fatāwā al-Hindiyyah*, Vol. 2, pp. 188-285; Ibn ʿĀbidīn, *Ḥāshiyah Radd al-Muḥtār*, Vol. 4, pp. 119-260.

[31] See, for example, al-Shāfiʿī, *Al-Umm*, Vol. 4, pp. 214-226; al-Shirāzī, *Al-Muhadhdhab*, Vol. 3, pp. 249-255; al-Shirbīnī, *Mughnī al-Muḥtāj*, Vol. 4, pp. 123-133; al-Ramlī, *Nihāyah al-Muḥtāj*, Vol. 7, pp. 402-413.

[32] See, for example, al-Qarāfī, *Al-Dhakhīrah*, Vol. 12, pp. 5-206; al-ʿAbdarī, *Al-Tāj wa al- Iklīl*, Vol. 6, pp. 229-319; al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, Vol. 6, pp. 230-323; al-Dardīr, *Al-Sharḥ al-Kabīr*, Vol. 4, pp. 237-358; Muḥammad ʿArafah al-Disūqī, *Ḥāshiyah al-Disūqī 'alā Al-Sharḥ al-Kabīr*, ed. Muḥammad ʿAllīsh (Beirut: Dār al-Fikr, n.d.), Vol. 4, pp. 237-358. However, unlike other Mālikī jurists, Ibn ʿAbd al-Barr discusses the laws of fighting against apostates, rebels, *khawārij* and *muḥāribūn* under the chapter of *al-Jihād*, see Ibn ʿAbd al-Barr, *Al-Kāfī fī Fiqh Ahl al-Madīnah*, pp. 205-224.

[33] See, for example, al-Mirdāwī, *Al-Inṣāf*, Vol. 10, pp. 150-353; al-Buhūtī, *Al-Rawḍ al-Murbi'*, Vol. 3, pp. 304-345; al-Buhūtī, *Kashshāf al-Qinā'*, Vol. 6, pp. 66-188; al-Rahaybānī, *Maṭālib*, Vol. 6, pp. 158-308.

[34] The other two categories of punishment in Islamic law are the *qiṣāṣ* (*lex talionis*, retaliation in case of killing and wounding) and *ta'zīr* (discretionary punishments left to the judgement of the ruler/ judge). For the definition of *ḥudūd*, see, for example, al-Kāsānī, *Badā'i' al-Ṣanā'i'*, Vol. 7, p. 33; al-Shaykh Niẓām, *Al-Fatāwā al-Hindiyyah*, Vol. 2, p. 142; Ibn Mawdūd, *Al-Ikhtiyār*, Vol. 4, p. 83; al-Buhūtī, *Al-Rawḍ al-Murbi'*, Vol. 3, pp. 304 f.; al-Buhūtī, *Kashshāf al-Qinā'*, Vol. 6, p. 77; al-Rahaybānī, *Maṭālib*, Vol. 6, p. 158; Abū Zahrah, *Al-'Uqūbah*, pp. 63-68, 83-187; J.N.D. Anderson, "Homicide in Islamic Law", *Bulletin of School of Oriental and African Studies*, Vol. 13, No. 4 1951, p. 811; ʿAbdur Raḥmān I. Doi, *Sharī'ah: The Islamic Law* (London: Ta Ha, 1984/1404), pp. 221-228; Sulaymān ʿAbd al-Raḥman al-Ḥaqīl, *Haqīqah Mawqif al-Islām min al-Taṭarruf wa al-Irhāb* (Riyadh: N.p., 2001/1421), p. 143; Frank E. Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia*, Studies in Islamic Law and Society, Vol. 8 (Brill: Leiden, 2000), pp. 240 f.; Frank E. Vogel, "The

unjustifiably include *baghy* among the *ḥudūd* crimes, which are: (1) fornication/adultery; (2) unproved accusation of fornication/adultery; (3) wine drinking; (4) theft; (5) *ḥirābah* and (6) apostasy.[35] The intriguing question here is why these Mālikī and Ḥanbalī jurists treat the law of rebellion under category of *ḥudūd* crimes particularly since the Qur'ānic verse above does not specify any punishment for the act of rebellion, let alone the fact that the act of rebellion is not criminalized in Islam, as explained below. Considering a possible answer to this question and finding the answers to the first three questions raised in the introduction of this chapter require examining the classical jurists' opinions on the permissibility of rebellion in Islam. Answers to all four questions can be sought in the jurists' opinions on this issue.

#### 5.2.1.1 Is Rebellion Permissible in Islamic Law?

At the outset, it is worth noting here that, first, classical Muslim jurists do not directly raise the specific question: Is rebellion permissible in Islam? So no direct or an easy answer to this question is given by the jurists. Second, Abou El Fadl, in his pioneering work on the area of rebellion in Islamic law, repeatedly affirms that the Islamic classical juristic rules on rebellion have been "ignored" in both outsider and modern insider scholarship.[36] However, in the scant discussions of this question in

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Trial of Terrorists under Classical Islamic Law", *Harvard International Law Journal*, Vol. 43, No. 1, Winter 2002, pp. 58-61.

[35] It is worth adding here that the Shāfiʿī jurist Muḥammad al-Ghazālī (b. 450/1058 d. 505-1111) also adds *baghy* to the above *ḥudūd* crimes. He treats these crimes under: Chapter of the Crimes for prescribed Punishments (*Kitāb al-Jinayāt al-Mūjbah lilʿqūbāt*). However, al-Ghazālī, like all the other scholars who do the same, does not give any punishment for *baghy*. See Muḥammad al-Ghazālī, *Al-Wajīz fī Fiqh al-Imām al-Shāfiʿī*, ed. ʿAlī Muʿawwaḍ and ʿĀdil ʿAbd al-Mawjūd (Beirut: Dār al-Arqam ibn Abī al-Arqam, 1997/1418), Vol. 2, pp. 163-182; Muḥammad al-Ghazālī, *Al-Waṣīt fī al-Madhhab*, ed. Aḥmad Maḥmūd Ibrāhīm and Muḥammad Muḥammad Tāmir (Cairo: Dār al-Salām, 1997/1417), Vol. 6, pp. 413-512. Also al-Ḥaqīl, a contemporary scholar in Saudi Arabia, includes *baghy* among the above *ḥudūd* crimes and claims that the punishment of the crime of *baghy* is capital punishment, see al-Ḥaqīl, *Haqīqah Mawqif al-Islām*, pp. 143, 150-153.

[36] Abou El Fadl, *Rebellion and Violence*, pp. 5, 8, 20 f. See also Abou El Fadl, "Political Crime in Islamic Jurisprudence", p. 2.

Western literature, certain renowned scholars have given rather clear-cut and simple, yet different, answers from those of the classical Muslim jurists considered below.

Fazlur Rahman claims that Islamic law "prohibits rebellion under almost any condition… [thus, he adds that, there is no law] of social or political protest against the government in Islam… [Muslim jurists, he reaffirms] prohibited all uprisings against an established rule."[37] Likewise, John Kelsay writes: "When is rebellion justified? The answer is, almost never."[38] However, Bernard Lewis, simply reiterating Khadduri's position,[39] claims that according to the juristic literature, "it is clear that what the jurists have in mind is not an attempt to overthrow the regime, but merely to withdraw from it and establish an independent state within a certain territory. In a word, their concern is not with revolution, but with secession."[40] Thus, Rahman and Kelsay agree that Muslim jurists virtually prohibit rebellion, while Lewis claims, and before him Khadduri's treatment mainly suggests, that the jurists do not even contemplate the permissibility of overthrowing the regime. Although Lewis, like Khadduri, restricts the jurists' discussions to secession, he does not explain whether the jurists prohibit it or not.

Concerning the classical jurists' answer to this question, as noted above, the jurists agree in principle that, once a person assumes the position of head of state either by the choice of the people or by usurpation and the use of force, it is impermissible for Muslims to rebel against him. But giving a satisfactory answer to this question requires referring to a number of different cases concerning the head of state that were addressed by the jurists.

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[37] Fazlur Rahman, "The Law of Rebellion in Islam", in Jill Raitt, ed., *Islam in the Modern World: 1983 Paine Lectures in Religion* (Columbia, MO.: University of Missouri-Columbia, n.d.), p. 1.
[38] John Kelsay, *Islam and War: A Study in Comparative Ethics* (Louisville, KY: Westminster/John Knox, 1993), p. 88.
[39] Khadduri, *War and Peace*, pp. 77-79.
[40] Lewis, *Islam in History*, p. 261.

First case: if the head of state fulfils the ten duties of his position, explained by the jurists, and maintains justice. Unsurprisingly, the jurists are unanimous that there is no need for rebellion against him in this case, even if he assumed the position through a coup, because revolting against him, the jurists warn, would lead to *fitnah*, bloodshed, instability and public disorder.

Second case: if the head of state apostatizes from Islam. The jurists here are unanimous that *khurūj*, rebelling, against the head of state in this case is compulsory, Rashīd Riḍā (d. 1354/1935) explains.[41]

Third case: if the head of state becomes physically or mentally unable to carry out the duties of his position – if, for example, he becomes insane, terminally ill or if he is captured by enemies. In this case, the head of state is to be deposed and a new one is to be appointed in his place.[42] If the regime prevents the appointment of a new head of state – bearing in mind the jurists' agreement that it is the collective obligation of Muslims to appoint a head of state – it is to be expected that any jurist would call for the appointment of a new head of state, even through the resort to force, particularly, because all Muslims would be guilty if they remain without a head of state.

Fourth case: if the head of state commands the Muslims to commit a sin or do something that absolutely contradicts the sharīʿah. According to Abou El Fadl, Ḥanafī and some of the Shāfiʿī and Mālikī jurists permit rebellion against the head of state based on the Islamic dictum: no obedience in sin.[43] Moreover, Riḍā asserts that "permitting an act whose prohibition is unanimously agreed upon, such as

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[41] Riḍā, *Tafsīr al-Manār*, Vol. 6, p. 367. See also Alsumaih, "The Sunni Concept of Jihad", pp. 92 f. Ibn ʿĀbidīn here only indicates that the ruler is to be deposed and thus did specifically mention that Muslims should resort to the use of force in order to overthrow him, see Ibn ʿĀbidīn, *Ḥāshiyah Radd al-Muḥtār*, Vol. 4, p. 264.
[42] See, for example, al-Shirbīnī, *Mughnī al-Muḥtāj*, Vol. 4, pp. 132 f.; Ibn ʿĀbidīn, *Ḥāshiyah Radd al-Muḥtār*, Vol. 4, p. 264; Ḥammīdullāh, *Muslim Conduct of State*, p. 184; Lambton, *State and Government in Medieval Islam*, p. 313.
[43] Abou El Fadl, "Political Crime in Islamic Jurisprudence", p. 13.

adultery/fornication, wine drinking, the annulment of *ḥudūd* or a law, which God does not permit, is unbelief and apostasy."[44] Therefore, Riḍā here links this case to the second one. In other words, rebellion in this case, according to him, is compulsory.

Fifth case: if the head of state is unjust and a tyrant. Only a minority of the jurists, including Ibn ʿUqayl, Ibn al-Jawzī and al-Juwaynī, and later Riḍā, permit rebellion in this case, but rebellion and the resort to the use of force to overthrow the head of state is permitted in this case only after he ignores calls to stop his injustice and tyranny. The precedent given by this minority of jurists in support of their position in this case is the rebellion of the Prophet's grandson, al-Ḥusayn, against Yazīd ibn Muʿāwiyah,[45] when the former was tragically killed in the battle in Muḥarram 61/October 680. According to this minority, if the ruler commits injustice, destroys the rights of Muslims or does not protect the religion and the interest of the Muslim nation, then Muslims are permitted to overthrow him, because he is betraying the very purposes for which he was appointed. But according to some among this minority, if overthrowing the ruler will lead to *fitnah*, Muslims should apply the juristic principle of "choosing the lesser of two evils", i.e., choosing which is the less harmful – the ruler's injustice or suffering the consequences of *fitnah* and the shedding of Muslim blood.[46] Although these are reasonably convincing justifications for rebellion, it should be reaffirmed here that this position is

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[44] Riḍā, *Tafsīr al-Manār*, Vol. 6, p. 367.
[45] Ibn Mufliḥ, *Al-Furūʿ*, Vol. 6, p. 153; al-Mirdāwī, *Al-Inṣāf*, Vol. 10, p. 311; Riḍā, *Tafsīr al-Manār*, Vol. 6, p. 367.
[46] Ibn ʿĀbidīn, *Ḥāshiyah Radd al-Muḥtār*, Vol. 4, p. 264; Riḍā, *Al-Khilāfah*, p. 22; ʿAwdah, *Al-Tashrīʿ al-Jināʾī al-Islāmī*, Vol. 2, p. 677.

maintained by only a tiny minority among the jurists. Moreover, jurists who refer to the minority's position hasten to add the majority's denunciation of it.[47]

According to the majority of the jurists, rebellion against the unjust ruler is prohibited in this case, even under the justification of the Islamic principle of "enjoining good and preventing evil." Simply, the jurists here prefer that Muslims be patient and endure the injustice and tyranny of the ruler. Their justification for this position is clear, however. Rebellion is prohibited because, if Muslims are permitted to resort to force in order to overthrow the unjust ruler and appoint another, this will lead to *fitnah*, bloodshed and a state of anarchy during which people's lives and property will not be safe.[48]

Thus, the majority of the jurists here base their position on purely pragmatic calculations, and disregard the precedent given by the minority of the jurists in support of the right of Muslims to overthrow their ruler in this case. In accordance with the juristic principle of "choosing the lesser of two evils", the majority of the jurists weighed the damaging consequences of rebellion against the ruler's injustice and strongly advocated, according to their calculations, that rebellion against the ruler would lead to more catastrophic consequences than his injustice, i.e., *fitnah*, bloodshed and a state of anarchy. It should be added here that the majority of the jurists' prohibition of rebellion in this case is the result of calculations that reflect their genuine concern for the interests of the Muslim nation. In other words, the jurists are not giving sanctity to unjust or corrupt regimes, specifically since they

[47] Ibn Mufliḥ, *Al-Furūʿ*, Vol. 6, p. 153; al-Mirdāwī, *Al-Inṣāf*, Vol. 10, p. 311; ʿAwdah, *Al-Tashrīʿ al-Jināʾī al-Islāmī*, Vol. 2, p. 677.

[48] Ibn Mufliḥ, *Al-Furūʿ*, Vol. 6, p. 153; al-Mirdāwī, *Al-Inṣāf*, Vol. 10, p. 311; ʿAwdah, *Al-Tashrīʿ al-Jināʾī al-Islāmī*, Vol. 2, p. 677; al-Būṭī, *Al-Jihād fī Al-Islām*, p. 153; Aḥmad Maḥmūd Krīmah, *Al-Jihād fī al-Islām: Dirāsah Fiqhiyyah Muqāranah* (Cairo: al-Dār al-Handasiyyah, 2003/1424), pp. 61 f.

were mainly independent jurist-scholars whose judgements here aimed at ensuring the interests of the Muslim nation in accordance with the Islamic principles.

Sixth case: more interestingly and significantly, if a person manages to overthrow the ruler and establish himself in the ruler's place through the use of force, should he be accepted as the legitimate ruler or should Muslims rebel against him? As referred to above, the jurists recognize the usurpation of power or *coup d'état* as the fourth method for the establishment of the head of state. In other words, the jurists here legitimize any *de facto* ruler who comes to power through a rebellion and prohibited a revolt against him. This means that the direct prohibition of rebellion against the ruler amounts to indirect permission for any future successful rebellion. Moreover, the jurists do not criminalize the act of rebellion and even accept and legitimate the authority of the successful rebel, but only after it becomes a *de facto* situation. The rationale for this position is, significantly, exactly the same as the rationale put forward by the majority of the jurists' for their adamant prohibition of rebellion against the *unjust* ruler. That is to say that, rebelling against the rebel who manages to overthrow the ruler and to take control of power will lead to *fitnah*, bloodshed and a state of anarchy during which people's lives and property will not be safe.[49]

Hence, it is quite evident that the jurists' overarching concern regarding the permissibility of rebellion is the prevention of bloodshed and maintaining stability, particularly in the fifth and sixth cases. Remarkably, however, the jurists do not raise this concern when it comes to the cases in which the dictates of the sharīʿah are contradicted, or even merely not assuredly protected. For example, in the second and third cases, namely, if the head of state apostatizes or becomes permanently unable to

[49] Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 5; al-Buhūtī, *Kashshāf al-Qināʿ*, Vol. 6, p. 159; al-Rahaybānī, *Maṭālib*, Vol. 6, p. 264.

carry out the duties of the position, obviously there is no assurance that the sharīʿah is protected, let alone if, as in the fourth case, the head of state commands the Muslims to commit something which is absolutely against the sharīʿah.

Therefore, in answer to the second question posed at the beginning of this chapter, it can be concluded here that, yes, the jurists unreservedly permit rebellion against the ruler if, first, Muslims are ordered to obey a command contrary to the sharīʿah, as in the fourth case; second, if the ruler does not protect the religion and the interests of Muslims, as in the second and third cases; and, for a minority of jurists, if he does not maintain justice or the rights of the citizens, as in the fifth case. Unlike the unreserved permission for rebellion in these cases, the majority of the jurists take a completely different approach in response to the fifth and the sixth cases, where their approach can be characterized as reserved, cautious, pragmatic and sometimes indirect. In brief, the jurists' calculation of which is the lesser evil – rebellion against the unjust ruler or enduring his injustice – reflects these characterizations. Thus, their answer to whether Muslims are permitted to rebel against the unjust ruler or not, as it is simply and beautifully put by Abou El Fadl, is: "it depends."[50] That is to say, if the good of rebellion outweighs its expected harm, then it is permissible, otherwise it is not.

However, in all cases the jurists' responses are extremely succinct when it comes to the permissibility of rebellion and only a minority of jurists touch upon this issue. Some jurists use the terms *khalʿ al-imām* or *ʿazl al-imām* (deposing the ruler) in reference to situations that do not explicitly indicate whether it is rebellion to overthrow the ruler or a peaceful change of regime that is implied, but in most cases, the jurists use both these terms in the sense of overthrowing the ruler. This is made

[50] Abou El Fadl, *Rebellion and Violence*, p. 331.

the more clear since they do not explain how a peaceful change of a regime might take place or who should be in charge of this task, and it must be borne in mind that most of the classical jurists who compiled the Islamic juristic rules discussed here lived under the rule of two dynasties who came to power through rebellions, i.e., the Umayyad Caliphate (661-750) and the Abbasid Caliphate (750-1258).[51] In the cases where the jurists explicitly mean rebellion against the ruler, they used the term *al-khurūj ʿalā al-imām* (literally, coming out against the ruler), i.e., rebellion against the ruler. This caution about being specific is most likely due to the fear of giving any unwarranted or misunderstood justification for resorting to the use of force among Muslims. Apparently, this is the result of some tragic incidents of civil war among the Muslims in the early history of Islam.

In answer to the first question set out at the beginning of this chapter, by the same token, if Muslims are explicitly permitted to rebel against their ruler if they are ordered to obey a command contrary to the sharīʿah, then the Islamic state authorities *a fortiori* have the right to use force if the Muslim citizens insisted on disobeying a command given by the state authorities that is explicitly based on the dictates of the sharīʿah. The most obvious example here is the war waged by the first caliph against certain Arab tribes who refused to pay *zakāh* after the Prophet's demise. But the interesting part of the answer to this question lies in cases where Muslim citizens, or at least a group of Muslims, disagree with, and start to challenge, the ruler or other government officials on the justness or the legitimacy of a command issued by the state authorities, or on another issue. The term used by the jurists to describe the rebels' disagreement with the state authorities on the justness or the legitimacy of a

[51] On the Umayyad and Abbasid's conception of the institution of the Caliphate and role of the Caliphs, see Crone and Hinds, *God's Caliph*, pp. 59-96. On the collapse of the Umayyad Caliphate see, Khalid Yahya Blankinship, *The End of the Jihād State: The Reign of Hishām Ibn ʿAbd al-Malik and the Collapse of the Umayyads* (New York: State University of New York Press, 1994).

command is that the rebels have a *ta'wīl* (just cause, plausible interpretation) concerning a command issued, or a position taken, by the state authorities. The answer in this case can be concluded from the jurists' discussions of the Islamic *jus in bello* addressing the law of fighting against rebels, discussed below. Significantly, their answer indicates the degree of tolerance the Islamic government should show in dealing with its internal opponents. Briefly, according to the Islamic regulations on fighting against rebels, before resorting to the use of force, the Islamic ruler has to send an envoy to engage with the rebels in discussions over the justness or legitimacy of their *ta'wīl*, i.e., their cause for non-compliance with a command, or staging a rebellion or secession. In the light of the results of the discussions with the rebels, the state authorities either must accept the rebels' demands and annul the command issued by the state and/or correct whatever injustices or illegalities perpetrated by the state, or else resort to the use of force to put down their rebellion if they do not respond to the state's demands.

Therefore, in answer to the third question set out at the beginning of this chapter, whether either Islamic state authorities or Muslim citizens can resort to the use of force against each other is covered mainly under the following three considerations: first, violation of the dictates of the sharīʿah; second, security, stability and public order of the Muslim nation; and third, protection of the citizens' rights and maintenance of justice. On the one hand, the Islamic state may resort to the use of force against a group of its citizens under the justification of the latter's persistently violating a sharīʿah obligation. On the other hand, the same justification may also apply to a rebellion if the state imposes on the citizens an obligation that contradicts the sharīʿah. In either case, this justification is based on the Islamic dictum: no obedience in sin. Obviously, the Islamic state may use force against

rebels under the justification of maintaining security, public order and stability, if the rebels resort to violence after the state has reached the conclusion that their demands are illegal or unjustifiable. Here the jurists unanimously emphasise that the objective of fighting against the rebels is not to eliminate them but to bring them into obedience to the ruler and thus prevent *fitnah* and public disorder.[52] It is worth recalling here that the majority of Muslim jurists prohibit rebellion against unjust rulers under the same justification of maintaining security and public order, and the same justification applies to the obligation of the state to use force against bandits, highway robbers and pirates, discussed below. Concerning the third justification, a minority of jurists permit Muslim citizens to resort to violence to change an Islamic government if it has failed to carry out its obligations of protecting Muslims' rights and maintaining justice.

In the light of the above discussion of the permissibility of rebellion in Islamic law and the justifications for the use of force of either the Islamic state or Muslim citizens against each other, the answer to the intriguing question of why the Mālikī and Ḥanbalī jurists treat the law of rebellion under the category of *ḥudūd* crimes remains unknown. Moreover, the fact that Ibn Taymiyyah and some other Ḥanbalī jurists maintain that rebellion is not a sinful act, let alone the Shāfiʿī jurists who argue that the term *baghy*, the jurists' technical term for rebellion, is not a derogatory term, adds to the mystery of this Mālikī and Ḥanbalī position. It is to be hoped that an answer to this question may still be deduced from the jurists'

[52] See, for example, Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 5; al-Anṣārī, *Asnā al-Maṭālib*, Vol. 4, p. 113; Abū Zahrah, *Al-Jarīmah*, p. 130; ʿAwdah, *Al-Tashrīʿ al-Jināʾī al-Islāmī*, Vol. 2, p. 690; ʿAwdah, *Criminal Law of Islam*, Vol. I, p. 118; Mahmassani, *Al-Qānūn wa al-ʿAlāqāt*, p. 198; Ḥammīdullāh, *Muslim Conduct of State*, p. 179; Lambton, *State and Government in Medieval Islam*, pp. 210 f.; Nik Rahim Nik Wajis, "The Crime of *Ḥirāba* in Islamic Law" (PhD thesis, Glasgow Caledonian University, 1996), p. 153; Alsumaih, "The Sunni Concept of Jihad", p. 80; Abou El Fadl, "Political Crime in Islamic Jurisprudence", pp. 11 f.; Abou El Fadl, *Rebellion and Violence*, pp. 157, 243; Sohail H. Hashmi, "Islam, Sunni", *Encyclopedia of Religion and War*, ed., Gabriel Palmer-Fernandez (New York, Routledge, 2004), p. 219.

discussions of the regulations concerning fighting against rebels and, particularly, if there is any punishment to be imposed on rebels for using force to overthrow the regime or secede from its rule.

### 5.2.1.2 Regulations Concerning War against Rebels

As in their approach to international armed conflicts, the jurists discuss the Islamic *jus in bello* against rebels in considerably more detail than is found in their scant discussion of the *jus ad bellum* addressing both the Islamic state's and the rebels' recourse to the use of force against each other. Before discussing the regulations for fighting against rebels, the jurists stipulate certain conditions needed for a Muslim group to be legally identified, or more precisely qualified, as rebels, and thereby treated accordingly under the Islamic law on rebellion, popularized in the Western literature by Abou El Fadl as *Aḥkām al-Bughāh*. Certainly, the reason for stipulating these conditions is to make it possible to differentiate the rebels, who are to be treated according to a law specific to them, from the other categories of Muslims who resort to the use of force such as the *khawārij* and the *muḥāribūn*. This is because the rebels are to receive different treatment from these last two categories both during and, more importantly, after the cessation of fighting. But more importantly, the aim is to regulate the recourse to the use of force among Muslims by ensuring that there are specific legitimate grounds and not to give a blank cheque for any citizen to use force against the government.

The jurists generally stipulate the following three conditions for a group of Muslims to be treated as rebels: First, the rebels must have *shawkah*/*manʽah*/*fay'ah*, force, power and organization. However, the jurists do not agree on the amount of force or power that the rebels must possess for the definition to apply. They attempt

to set general broad lines for *shawkah* in terms of the number of rebels and the force they possess.[53] For example, the Shāfiʿī jurist al-Shirbīnī vaguely indicates that *shawkah* means that rebels constitute a large number,[54] while for al-Mirdāwī from the Ḥanbalī school it means that they are not small in number.[55] Some Shāfiʿī jurists state that if a group manages to control a stronghold[56] or a town,[57] this means that they have a *shawkah*, because, if they manage to control a stronghold or a town, it indicates that they have a large number of people and/or military force. Some jurists stipulate that the rebels must have a leader to fulfil the requirement of *shawkah*.[58] But the most practical indication is whether the state needs to call on the army to put down their rebellion.[59] It is obvious from all these different ways of measuring the rebels' power that what the jurists mean is that rebels must be a unified group who have popular support for their act of rebellion or secession and that they are unified under the command of a leader.

The significance of the requirement of *shawkah* is that it indicates that the rebels potentially, though not necessarily, have a just cause and therefore, and more importantly, they are not a handful of individuals of criminals, violent religious extremists, a clandestine organization or terrorists.[60] Moreover, if *shawkah* were not a condition for the status of rebels, any handful of individuals might resort to the use

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[53] Al-Shirbīnī, *Al-Iqnāʿ*, Vol. 2, p. 547; ʿAwdah, *Al-Tashrīʿ al-Jināʾī al-Islāmī*, Vol. 2, p. 680; Sherman A. Jackson, "Domestic Terrorism in the Islamic Legal Tradition", *The Muslim World*, Vol. 91, Issue 3-4, September 2001, p. 302.
[54] Al-Shirbīnī, *Mughnī al-Muḥtāj*, Vol. 4, p. 123. See also al-Shāfiʿī, *Al-Umm*, Vol. 4, p. 218; Abou El Fadl, *Rebellion and Violence*, p. 151.
[55] Al-Mirdāwī, *Al-Inṣāf*, Vol. 10, p. 311. See also Ibn Mufliḥ, *Al-Furūʿ*, Vol. 6, p. 147.
[56] Al-Anṣārī, *Asnā al-Maṭālib*, Vol. 4, p. 112; al-Shirbīnī, *Mughnī al-Muḥtāj*, Vol. 4, p. 123; al-Ramlī, *Nihāyah al-Muḥtāj*, Vol. 7, p. 403.
[57] Al-Shirbīnī, *Al-Iqnāʿ*, Vol. 2, p. 547.
[58] Al-Nawawī, *Al-Majmūʿ*, Vol. 20, pp. 348 f.; al-Shirbīnī, *Al-Iqnāʿ*, Vol. 2, p. 547; al-Ghazālī, *Al-Waṣīt*, Vol. 6, pp. 415 f.; al-Mirdāwī, *Al-Inṣāf*, Vol. 10, p. 312; Ibn Mufliḥ, *Al-Furūʿ*, Vol. 6, p. 147; ʿAwdah, *Al-Tashrīʿ al-Jināʾī al-Islāmī*, Vol. 2, p. 680. It is worth repeating here that al-Buhūtī did not stipulate that the rebels must have a leader, see, al-Buhūtī, *Al-Rawḍ al-Murbiʿ*, Vol. 3, p. 335.
[59] Al-Qarāfī, *Al-Dhakhīrah*, Vol. 12, p. 6; al-Rahaybānī, *Maṭālib*, Vol. 6, p. 161.
[60] See Abou El Fadl, "*Ahkam al-Bughat*", p. 166; Abou El Fadl, *Rebellion and Violence*, p. 242; Jackson, "Domestic Terrorism in the Islamic Legal Tradition", p. 303.

of force against the government under whatever justification they claim, and escape punishment.[61] Thus, if a group of Muslims who do not have a *shawkah* but claim that they have a just cause, or vice versa, commit murder or destroy any property during their recourse to the use of force in a rebellion, they will not be treated under the law of rebellion. Therefore, importantly, according to al-Shāfiʿī, they will be punished like any other criminals for the crimes they commit,[62] while for Abū Ḥanīfah and Ibn Ḥanbal they are to be punished according to the law of *ḥirābah*, i.e., as highway robbers if they commit acts punishable under that law.[63]

Second, the rebels must have a *ta'wīl*, put simply, a justification for the recourse to rebellion. This justification relates to what the rebels claim to be illegal decisions taken, or any injustice inflicted upon them, by the government. The rebels' interpretation or explanation of this justification may be based on religious or political grounds or it may be simply a complaint of injustice inflicted upon them.[64] It is worth reaffirming here that there is sometimes no clear distinction between what is based on religious and what is based on purely political considerations and that in many cases the religious and political considerations, as well as the dictates of justice, overlap in Islamic theory and practice.

Importantly, the jurists agree that it is not necessary that the rebels' claim regarding illegal or unjust decisions issued by the government should be true or valid. Some jurists do stipulate that the rebels' interpretation should be plausible and

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[61] Abou El Fadl, *Rebellion and Violence*, p. 242.
[62] Al-Shāfiʿī, *Al-Umm*, Vol. 4, p. 218; ʿAwdah, *Al-Tashrīʿ al-Jinā'ī al-Islāmī*, Vol. 2, p. 681.
[63] Ibn Mawdūd, *Al-Ikhtiyār*, Vol. 4, p. 160; ʿAwdah, *Al-Tashrīʿ al-Jinā'ī al-Islāmī*, Vol. 2, p. 681. See also Suʿūd ʿAbd-Allah al-Qaḥṭānī, "Waṣf al-Irhābiyyn bi 'al-Bughāh' Taḍlīl fī al-Muṣṭlaḥ lā Yuqṣad minh illā Tahwīn Jarā'imuhum", *Al-Riyadh* [Daily Newspaper], [article online]; available from: http://www.alriyadh.com/2004/08/04/article14044.html; Internet; accessed 23 March 2009.
[64] See, for example, ʿAwdah, *Al-Tashrīʿ al-Jinā'ī al-Islāmī*, Vol. 2, p. 680; ʿAwdah, *Criminal Law of Islam*, Vol. I, pp. 115 f.; Klein, *The Religion of Islam*, p. 182; Abou El Fadl, "Political Crime in Islamic Jurisprudence", pp. 15 f.; Abou El Fadl, *Rebellion and Violence*, p. 243; Kelsay, *Islam and War*, pp. 89 f.; Jackson, "Domestic Terrorism in the Islamic Legal Tradition", p. 302.

that if it is blatantly and obviously false, they will not be treated as rebels,[65] but according to the majority of jurists, the mere fact that the rebels believe that their justification for rebellion to be valid gives them the right to recourse to rebellion, provided that the other conditions are fulfilled. This stance indicates the jurists' concern not to leave the judgment of the validity of the rebels' justifications for rebellion in the hands of their opponents, i.e., the state authorities. More importantly, the jurists' leniency, which is manifested in acknowledging the potential validity of the rebels' justifications, is explained by drawing a parallel with the mistakes made by jurists.[66] Jurists who make mistakes in their judgements nevertheless, undoubtedly do their utmost to reach the right judgement and obviously, in their own opinion, believe their judgements to be right. Likewise, in the opinion of the rebels their justifications for rebellion are right, and this is considered by the jurists to be reasonable grounds for the right to rebellion, if the other conditions are met. This is despite the fact that jurists tend to suggest that rebels' justifications are likely not to be valid, possibly because the rebels' opinion is still that of the minority. But this leniency does not amount to a licence for an immediate resort to violence because, before the initiation of acts of violence, the state should approach the rebels in order to address the causes for which they intend to resort to violence so that a potential conflict might be prevented through negotiation and reconciliation.

Significantly, the word *ta'wīl* is specifically used by the jurists here because, in one sense, it means 'interpretation', which is used in cases where matters are not conclusively and absolutely clear. This means that different understandings and interpretations of, or in other words, disagreements on, such cases are not unwelcome for investigations. Thus, the rebels' disagreement with the government on its

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[65] Al-Shirbīnī, *Al-Iqnā'*, Vol. 2, p. 548; Abou El Fadl, "Political Crime in Islamic Jurisprudence", pp. 16 f.
[66] Ibn Taymiyyah, *Al-Khilāfah wa al-Mulk*, p. 88; Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 12.

allegedly un-Islamic or unjust decision is considered by the majority of the jurists as reasonable grounds for resorting to rebellion, provided that the rebels have popular support, *shawkah*, because, if *shawkah* were not required, individuals would invent a *ta'wīl* to justify their recourse to violence. On the other hand, it stands to reason that, if a group of Muslims have a *shawkah* but do not provide a *ta'wīl* for resorting to violence, they will be treated as criminals, not rebels.

Third, there must be an act of *khurūj*, rebellion against the head of state or other state authorities. Some Mālikī jurists restrict *khurūj* to acts of rebellion against the head of state alone, while others also include his deputy.[67] *Khurūj* (literally: 'coming out against') means the use of force to overthrow the head of state and install another in his place. Here some jurists distinguish between using force to overthrow a head of state who is appointed in accordance with one of the first three methods of appointing the head of state listed above, and one who has reached this position through a coup, the fourth method. Al-Nawawī permits rebellion to overthrow a head of state who has come to power through a coup, but not if he has been appointed by one of the other methods.[68] Al-Nawawī here is advocating what is to some extent an equivalent of the world's increasing tendency towards what is nowadays called the prohibition of the violent overthrow of democratically elected governments.[69] Other jurists explain that if a group attempts to violently overthrow the head of state, not because of his injustice but because they claim that they have the right to rule, then the head of state has the right to put down their rebellion and the masses should support him against such rebels.[70]

[67] See al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, Vol. 6, 278.
[68] Al-Nawawī, *Al-Majmū'*, Vol. 20, p. 337.
[69] See Kirsti Samuels, "*Jus ad Bellum* and Civil Conflicts: A Case Study of the International Community's Approach to Violence in the Conflict in Sierra Leone", *Journal of Conflict and Security Law*, Vol. 8, No. 2, 2003, pp. 315 f., 326-331, 336-338.
[70] Al-Shaykh Niẓām, *Al-Fatāwā al-Hindiyyah*, Vol. 2, p. 284.

Thus, the main point here is that, for an act of *khurūj* to be treated under the law of rebellion, there must be a *mughālabah* (conflict, fighting, use of force), or in the words of the Ḥanafī jurist Ibn Najīm, that taking of a town by force.[71] Therefore the rebels, as described by ʿAllīsh, are *al-muqātilah*[72] (the combatants) who use violence against the ruler and "therefore, whoever disobeys the ruler without resorting to the use of force is not a rebel."[73] Hence, other forms of disobedience to the ruler, such as peaceful or passive disobedience, do not render the ruler's opponents rebels.[74] According to ʿAwdah; Mālik, Shāfiʿī, Ibn Ḥanbal and the Ẓāhirīs, the actual use of violence is necessary in order for opponents of the state to be classified as rebels, while for Abū Ḥanīfah they become rebels as soon as they assemble in preparation for fighting. It is worth noting here that Abū Ḥanīfah's decision is based on purely pragmatic military considerations, because if the head of state waits until the rebels actually use force, he may not be able to mount a defence against their attack.[75]

However, Abou El Fadl argues that for *most* medieval jurists "a passive act of non-compliance" with an obligation qualifies as an act of rebellion and is therefore, subject to the law of rebellion.[76] But this argument is not supported by what Abou El Fadl claims is the opinion of most medieval jurists and so the significance of his insistence on this argument is unclear. This argument is based on a false premise because the law of rebellion, according to the majority of jurists, applies only once

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[71] Ibn Najīm, *Al-Baḥr al-Rā'iq*, Vol. 5, p. 152.
[72] ʿAllīsh, *Minaḥ al-Jalīl*, Vol. 9, p. 195.
[73] ʿAllīsh, *Minaḥ al-Jalīl*, Vol. 9, p. 195. Kamali notes here that the rebel's action is legally treated as rebellion: "only when it is accompanied by force which challenges the authority of the imām", Kamali, *Freedom of Expression in Islam*, p. 199. See also Ilesanmi, Simeon O. "Just War Theory in Comparative Perspective: A Review Essay", *Journal of Religious Ethics*, Vol. 28, No. 1, 2000, p. 151.
[74] Al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, Vol. 6, p. 278; ʿAllīsh, *Minaḥ al-Jalīl*, Vol. 9, p. 195; ʿAwdah, *Al-Tashrīʿ al-Jinā'ī al-Islāmī*, Vol. 2, p. 687.
[75] ʿAwdah, *Al-Tashrīʿ al-Jinā'ī al-Islāmī*, Vol. 2, pp. 688 f. See also Abou El Fadl, "Political Crime in Islamic Jurisprudence", p. 20.
[76] Abou El Fadl, "Political Crime in Islamic Jurisprudence", pp. 13, 19, 25.

the rebels actually use force or, according to Abū Ḥanīfah, once they assemble to fight. Practically speaking, to borrow the example given by Abou El Fadl, "if a group of Muslims refuse to pay taxes, this is an act of *khuruj* (assuming that there is a *ta'wil* and *shawka*). There are two options, the state can force such a group to pay taxes and not apply *ahkam al-bughah*. Alternatively, the state can force such a group to pay taxes and apply *ahkam al-bughah*."[77] Concerning the second option, according to the law of rebellion, the state cannot use force against such a group, as Abou El Fadl himself notes,[78] unless it has determined that the reasons for their refusal to pay taxes are illegitimate and unless the group use violence or assemble for it, as shown above.

If the three conditions referred to above are met by any Muslim group that attempts to use violence to overthrow the ruler, or to secede from his rule, or to reject the application of the law, the ruler should send an envoy to ask them the reasons for their rebellion. If the rebels prove that an injustice has been inflicted upon them, the state should remove the injustice, and if they have any disagreement with or misunderstanding about one of the ruler's commands or positions, the state should clarify the misunderstanding and explain its position to the rebels. If the rebels still insist on resorting to force after the injustice has been removed and the state's position has been clarified, the rebels should be advised to abandon their determination to use violence and to return to being obedient to the ruler. It is interesting to note here that some jurists add that, if the rebels pay no heed to this advice, the state should call on them to attend a *munāẓarah*, a public debate, to determine who is right and who is wrong. If the rebels reject all these procedures, they should be warned that the state will use force to put down their rebellion.

[77] Ibid., p. 19.
[78] Ibid., p. 21.

Finally, if all these attempts to prevent potential civil conflict peacefully through this process of negotiation and reconciliation fail, the state is left with no option but to use force to put down the rebellion after the rebels initiate acts of violence, according to the majority of the jurists, or, according to Abū Ḥanīfah, once they assemble to fight.[79]

If the rebels ask the ruler to give them a period of time to reach a decision about whether to resort to the use of force or to cancel their plans for rebellion, the decision should be left to the discretion of the ruler. If the ruler believes that the rebels are sincere in asking for this period of time so that they can reconsider their decision, he should give them the period of time they have asked for, but if the ruler believes that asking for this period of time is a strategy so that they can regroup or have more time to receive military reinforcements, the ruler should not give them this period of time.[80]

It is interesting to note here that this Islamic process of preventing a potential civil conflict coincides in some respects with the current international approach to resolving civil conflicts through negotiation and reconciliation, as Kirsti Samuels explains in her case study of the almost decade-long civil conflict in Sierra Leone

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[79] See, for example, Ibn Najīm, *Al-Baḥr al-Rā'iq*, Vol. 5, p. 151; al-Kāsānī, *Badā'iʿ al-Ṣanā'iʿ*, Vol. 7, p. 140; Ibn Mawdūd, *Al-Ikhtiyār*, Vol. 4, p. 161; al-Shaykh Niẓām, *Al-Fatāwā al-Hindiyyah*, Vol. 2, p. 283; al-Shāfiʿī, *Al-Umm*, Vol. 4, p. 218; al-Nawawī, *Al-Majmūʿ*, Vol. 20, p. 349; al-Shirbīnī, *Al-Iqnāʿ*, Vol. 2, p. 549; al-Shirbīnī, *Mughnī al-Muḥtāj*, Vol. 4, p. 126; al-Ramlī, *Nihāyah al-Muḥtāj*, Vol. 7, pp. 405 f.; al-Anṣārī, *Manhaj al-Ṭullāb*, pp. 123 f.; al-Anṣārī, *Asnā al-Maṭālib*, Vol. 4, p. 114; al-Shirāzī, *Al-Muhadhdhab*, Vol. 3, p. 249; al-Māwardī, *Naṣīḥah al-Mulūk*, p. 255; al-Qarāfī, *Al-Dhakhīrah*, Vol. 12, p. 7; Ibn ʿAbd al-Barr, *Al-Kāfī fī Fiqh Ahl al-Madīnah*, p. 222; al-Dardīr, *Al-Sharḥ al-Kabīr*, Vol. 4, p. 299; Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 5; al-Mirdāwī, *Al-Inṣāf*, Vol. 10, p. 312; al-Buhūtī, *Al-Rawḍ al-Murbiʿ*, Vol. 3, p. 336; al-Buhūtī, *Kashshāf al-Qināʿ*, Vol. 6, p. 162; Ibn Mufliḥ, *Al-Furūʿ*, Vol. 6, p. 147; al-Rahaybānī, *Maṭālib*, Vol. 6, pp. 267 f.; Ibn Taymiyyah, *Al-Khilāfah wa al-Mulk*, p. 65; ʿAwdah, *Al-Tashrīʿ al-Jinā'ī al-Islāmī*, Vol. 2, p. 689; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 2, pp. 1002 f.; Lambton, *State and Government in Medieval Islam*, p. 211; Nik Wajis, "The Crime of *Ḥirāba* in Islamic Law", p. 153; Abou El Fadl, "Political Crime in Islamic Jurisprudence", p. 15; Abou El Fadl, *Rebellion and Violence*, pp. 152, 159.

[80] Al-Shirbīnī, *Mughnī al-Muḥtāj*, Vol. 4, pp. 126 f.; Ibn Qudāmah, *Al-Mughnī*, Vol. 9, pp. 5 f.; al-Buhūtī, *Kashshāf al-Qināʿ*, Vol. 6, p. 162; al-Rahaybānī, *Maṭālib*, Vol. 6, p. 268; ʿAwdah, *Al-Tashrīʿ al-Jinā'ī al-Islāmī*, Vol. 2, p. 690.

which began in 1991.[81] Nevertheless, significantly, the classical jurists give two different reasons for obligating the Islamic state to follow this peaceful approach in resolving civil conflicts: first, this is what the Qur'ānic verse (49:9) dictates and, second, this is the approach followed by the fourth caliph, ʿAlī ibn Abī Ṭālib, in resolving civil conflicts during his reign, namely the battles of al-Jamal 36/656 and al-Nahrawān 38/ 658.[82] These reasons exemplify the importance of the scriptural basis and early Islamic precedents in formulating Islamic laws.

In answer to the fourth question posed at the beginning of this chapter, if a military confrontation with the rebels becomes inevitable, the Islamic state army must abide by the rules regulating this kind of domestic conflict. It is striking to note that the jurists tend to apply these rules to the conduct of one party to the conflict, the Islamic state army, but not to the other, the rebels. In other words, the jurists fail to include the rebels in the obligation to follow these rules and neither do they develop any particular set of rules to regulate their conduct during the war, unless the jurists mean to imply that the rebels too are expected to abide by the same rules as the state. In their discussions of the Islamic *jus in bello* governing war against rebels, classical Muslim jurists address the main issues treated under the regulations governing international armed conflicts, discussed in Chapter Four. The main difference between the laws governing international wars and those that apply to internal hostilities, particularly in this instance war against rebels, is a number of laws relating to post war issues, such as the liability of the rebels for the destruction of lives and property, the collaboration of the rebels with the *dār a-ḥarb*, and the taxes

[81] Samuels, "*Jus ad Bellum* and Civil Conflicts", pp. 315 f., 332 f., 338.
[82] See, for example, al-Anṣārī, *Asnā al-Maṭālib*, Vol. 4, p. 114; al-Shirbīnī, *Al-Iqnāʿ*, Vol. 2, p. 549; al-Shirbīnī, *Mughnī al-Muḥtāj*, Vol. 4, p. 126; Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 5; ʿAwdah, *Al-Tashrīʿ al-Jināʾī al-Islāmī*, Vol. 2, p. 689.

collected and judgments passed by the rebels during their secession or control of a town or a village.

#### 5.2.1.2.1 Non-Combatant Immunity

As with the rules of international armed conflicts, the jurists agree that non-combatants accompanying the rebels during war operations, such as women, children, the aged, the wounded and the blind, cannot be targeted.[83] But if, for example, women, farmers or slaves engage in the fighting, they can be targeted, exactly as in international armed conflicts.[84] As for the rebel fighters, the Shāfiʿī and Ḥanbalī jurists maintain that they can be targeted only when they are actually fighting (*muqbilīn*), i.e., when they are attacking. In other words, the "rebels could not be pursued if in rout"[85] or if they are escaping (*mudbirīn*). Hence, if the rebels lay down their arms, escape from the combat, or are in any other *hors de combat* situation as a result, for example, of being injured or captured, they cannot be killed.[86] It is only if these rebels, in the words of the Ḥanafī jurists, join another

[83] See, for example, al-Kāsānī, *Badā'i' al-Ṣanā'i'*, Vol. 7, p. 141; Ibn Najīm, *Al-Baḥr al-Rā'iq*, Vol. 5, pp. 152 f.; Ibn Mawdūd, *Al-Ikhtiyār*, Vol. 4, p. 162.
[84] See, for example, Muḥammad ibn al-Ḥasan al-Shaybānī, *Al-Siyar*, ed. Majid Khadduri (Beirut: Al-Dār al-Muttaḥidah, 1975), p. 233; Ibn Mawdūd, *Al-Ikhtiyār*, Vol. 4, p. 162; al-Shāfiʿī, *Al-Umm*, Vol. 4, p. 219; al-Dardīr, *Al-Sharḥ al-Kabīr*, Vol. 4, p. 300; al-Qarāfī, *Al-Dhakhīrah*, Vol. 12, p. 9; ʿAllīsh, *Minaḥ al-Jalīl*, Vol. 9, p. 204.
[85] Hashmi, "Islam, Sunni", p. 219.
[86] See, for example, al-Shāfiʿī, *Al-Umm*, Vol. 4, p. 218; al-Nawawī, *Al-Majmū'*, Vol. 20, pp. 343 f.; al-Shirāzī, *Al-Muhadhdhab*, Vol. 3, pp. 250-252; al-Anṣārī, *Asnā al-Maṭālib*, Vol. 4, p. 114; al-Anṣārī, *Manhaj al-Ṭullāb*, p. 124; al-Shirbīnī, *Mughnī al-Muḥtāj*, Vol. 4, p. 127; al-Māwardī, *Naṣīḥah al-Mulūk*, p. 255; al-Ramlī, *Nihāyah al-Muḥtāj*, Vol. 7, p. 407; Ibn ʿAbd al-Barr, *Al-Kāfī fī Fiqh Ahl al-Madīnah*, p. 222; Ibn Qudāmah, *'Umdah al-Fiqh*, p. 149; Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 9; al-Mirdāwī, *Al-Inṣāf*, Vol. 10, pp. 314 f.; al-Buhūtī, *Al-Rawḍ al-Murbi'*, Vol. 3, pp. 336 f.; Ibn Mufliḥ, *Al-Furū'*, Vol. 6, pp. 149 f.; al-Rahaybānī, *Maṭālib*, Vol. 6, p. 269; Abū Zahrah, *Al-Jarīmah*, p. 128; ʿAwdah, *Al-Tashrī' al-Jinā'ī al-Islāmī*, Vol. 2, p. 690; Mahmassani, *Al-Qānūn wa al-'Alāqāt*, p. 198; Nik Wajis, "The Crime of *Ḥirāba* in Islamic Law", p. 153; Abou El Fadl, *Rebellion and Violence*, pp. 152, 160.

group in order to continue the fighting or, in the words of the Mālikī jurists, constitute a danger to the state army, that they can be pursued and/or killed.[87]

Concerning the rebels' collaboration with the *dār a-ḥarb*, some Shāfiʿī jurists advocate that, if a part of the *dār a-ḥarb* that has a peace treaty with the Islamic state collaborates with the rebels and fights alongside them against the Islamic state, this revokes the peace treaty.[88] Moreover, if the rebels conclude a treaty granting *amān*, quarter and safe conduct, with the *dār al-ḥarb* on condition that the latter will support the rebels in the fighting against the Islamic state, this treaty will be binding only on the rebels and not on the Islamic state. But if the rebels conclude such a treaty without stipulating the military support of the *dār al-ḥarb* in the fighting against the Islamic state, the treaty is binding on both the rebels and the Islamic state.[89]

**5.2.1.2.2 Indiscriminate Weapons**

The jurists' discussions of the use of weapons in war against the rebels address solely the permissibility of the use of indiscriminate weapons such as mangonels (a weapon for catapulting large stones),[90] fire, flooding and poisoning. This reflects the same concern shown by the jurists in their discussions of the use of weapons in war against non-Muslims, discussed in Chapter Four. The main concern of the jurists' discussions of the use of weapons in both domestic and international conflicts is the

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[87] See, for example, al-Shaybānī, *Al-Siyar*, p. 228; al-Kāsānī, *Badā'i' al-Ṣanā'i'*, Vol. 7, pp. 140 f.; Ibn Najīm, *Al-Baḥr al-Rā'iq*, Vol. 5, p. 152; Ibn Mawdūd, *Al-Ikhtiyār*, Vol. 4, p. 161; al-Shaykh Niẓām, *Al-Fatāwā al-Hindiyyah*, Vol. 2, p. 284; al-Qarāfī, *Al-Dhakhīrah*, Vol. 12, p. 7; al-Ṣāwī, *Bulghah al-Sālik*, Vol. 4, p. 222; al-Dardīr, *Al-Sharḥ al-Kabīr*, Vol. 4, p. 300; Ibn Ḥazm, *Al-Muḥallā*, Vol. 11, p. 101; ʿAwdah, *Al-Tashrī' al-Jinā'ī al-Islāmī*, Vol. 2, p. 691; Abou El Fadl, *Rebellion and Violence*, p. 244.

[88] Al-Shāfiʿī, *Al-Umm*, Vol. 4, p. 221; ʿAwdah, *Al-Tashrī' al-Jinā'ī al-Islāmī*, Vol. 2, p. 704; Ḥammīdullāh, *Muslim Conduct of State*, p. 180.

[89] Al-Shirbīnī, *Mughnī al-Muḥtāj*, Vol. 4, p 128; al-Ramlī, *Nihāyah al-Muḥtāj*, Vol. 7, p. 408.

[90] See, for example, al-Shāfiʿī, *Al-Umm*, Vol. 4, p. 288; al-Ramlī, *Nihāyah al-Muḥtāj*, Vol. 7, p. 407; Ibn ʿĀbidīn, *Ḥāshiyah Radd al-Muḥtār*, Vol. 4, p. 129.

risk to the lives of non-combatants through the use of such indiscriminate weapons. Here the jurists are divided into three groups concerning the permissibility of using these weapons in military actions against rebels. First, the Shāfiʿī jurists prohibit them.[91] Second, the Ḥanbalī jurists also prohibit them, except in cases of military necessity[92] or in reciprocity.[93] Third, the Ḥanafī and Mālikī jurists permit the use of indiscriminate weapons, although some Mālikī jurists add that this permission is valid only if there are no women or children among the rebels.[94]

It is worth adding here that the jurists of the four schools unanimously agree that it is not permitted for the state army to use weapons confiscated from the rebels to fight against them, except in cases of dire military necessity.[95] The Ḥanafī jurist ʿAlā al-Dīn al-Kāsānī (d. 587/1191) explains that confiscated weapons are the property of the rebels and, therefore, the state has no right to use them except in cases of military necessity,[96] unlike weapons and property seized from non-Muslims in international armed conflicts, which become spoils of war. But in any case, whether the state army use the rebels' weapons in cases of military necessity or not,

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[91] Al-Ramlī, *Nihāyah al-Muḥtāj*, Vol. 7, p. 407; al-Anṣārī, *Asnā al-Maṭālib*, Vol. 4, p. 115; Abou El Fadl, "Political Crime in Islamic Jurisprudence", p. 20.

[92] Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 7; al-Buhūtī, *Al-Rawḍ al-Murbiʿ*, Vol. 3, p. 336; al-Buhūtī, *Kashshāf al-Qināʿ*, Vol. 6, p. 163; al-Rahaybānī, *Maṭālib*, Vol. 6, p. 268; Abou El Fadl, *Rebellion and Violence*, p. 160.

[93] Al-Buhūtī, *Kashshāf al-Qināʿ*, Vol. 6, p. 163; al-Rahaybānī, *Maṭālib*, Vol. 6, p. 268; Khadduri, *War and Peace*, p. 79; Ḥammīdullāh, *Muslim Conduct of State*, p. 181; Abou El Fadl, *Rebellion and Violence*, p. 160.

[94] Al-Shaybānī, *Al-Siyar*, p. 231; al-Kāsānī, *Badā'iʿ al-Ṣanā'iʿ*, Vol. 7, p. 141; Ibn Najīm, *Al-Baḥr al-Rā'iq*, Vol. 5, p. 152; Ibn Mawdūd, *Al-Ikhtiyār*, Vol. 4, p. 161; al-Shaykh Niẓām, *Al-Fatāwā al-Hindiyyah*, Vol. 2, p. 284; al-Qarāfī, *Al-Dhakhīrah*, Vol. 12, p. 8; al-Dardīr, *Al-Sharḥ al-Kabīr*, Vol. 4, p. 299; Ibn Ḥazm, *Al-Muḥallā*, Vol. 11, p. 116; ʿAwdah, *Al-Tashrīʿ al-Jinā'ī al-Islāmī*, Vol. 2, p. 693; Abou El Fadl, "Political Crime in Islamic Jurisprudence", p. 20. Ibn Ḥazm permits the use of mangonels or other shooting weapons, but prohibits the use of fire or flooding in the fighting against the rebels because these will lead to indiscriminate casualties among the civilians. See Ibn Ḥazm, *Al-Muḥallā*, Vol. 11, p. 116.

[95] See, for example, al-Shaybānī, *Al-Siyar*, p. 229; al-Kāsānī, *Badā'iʿ al-Ṣanā'iʿ*, Vol. 7, p. 141; Ibn Mawdūd, *Al-Ikhtiyār*, Vol. 4, p. 162; al-Shirbīnī, *Al-Iqnāʿ*, Vol. 2, p. 549; al-Qarāfī, *Al-Dhakhīrah*, Vol. 12, pp. 11 f.; al-Dardīr, *Al-Sharḥ al-Kabīr*, Vol. 4, pp. 299 f.; al-Disūqī, *Ḥāshiyah al-Disūqī*, Vol. 4, pp. 299; ʿAllīsh, *Minaḥ al-Jalīl*, Vol. 9, p. 201; Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 11; al-Mirdāwī, *Al-Inṣāf*, Vol. 10, p. 314; al-Buhūtī, *Kashshāf al-Qināʿ*, Vol. 6, p. 164; al-Rahaybānī, *Maṭālib*, Vol. 6, p. 270; Ibn Ḥazm, *Al-Muḥallā*, Vol. 11, p. 102; ʿAwdah, *Al-Tashrīʿ al-Jinā'ī al-Islāmī*, Vol. 2, p. 695.

[96] Al-Kāsānī, *Badā'iʿ al-Ṣanā'iʿ*, Vol. 7, p. 141. See also Ibn Ḥazm, *Al-Muḥallā*, Vol. 11, p. 104.

these weapons and any other property confiscated from them during the war must be returned to them after the cessation of hostilities.[97]

Therefore, despite the limited destructive capacity of the above mentioned primitive indiscriminate weaponry, the jurists' discussion of these weapons proves that their overarching concern is protecting the lives of innocent civilians. With the exception of the Ḥanafīs, the jurists commonly agree on the prohibition of the use of these indiscriminate weapons against rebels. But the point here is that the Ḥanafī position, which breaks the consensus of the jurists on this issue, can be exploited to sanction the use of modern indiscriminate weaponry, which can have catastrophic consequences for the civilian population. This example, which typifies the disagreement of the jurists with regard to the larger part of Islamic law, underlines the importance of the current calls for the codification of Islamic law and the need for the exercise of continuous *ijtihād* to take into consideration the different and ever changing world contexts when Islamic rulings are pronounced.

**5.2.1.2.3 Prisoners and Hostages**

Only some jurists of the Ḥanafī school give the ruler permission to either execute detained rebels or keep them in detention for as long as the rebels still have a *shawkah*, i.e., for as long as they constitute a danger to the state army,[98] but they do argue that it is preferable that rebels are kept in detention until after the rebellion

[97] Al-Shaybānī, *Al-Siyar*, p. 229; al-Samarqandī, *Tuḥfah al-Fuqahā'*, Vol. 3, p. 313; al-Kāsānī, *Badā'i' al-Ṣanā'i'*, Vol. 7, p. 141; Ibn Mawdūd, *Al-Ikhtiyār*, Vol. 4, p. 162; al-Shirbīnī, *Al-Iqnā'*, Vol. 2, p. 549; al-Māwardī, *Al-Aḥkām al-Sulṭāniyyah*, p. 82; al-Qarāfī, *Al-Dhakhīrah*, Vol. 12, pp. 11 f.; al-Dardīr, *Al-Sharḥ al-Kabīr*, Vol. 4, pp. 299 f.; al-Disūqī, *Ḥāshiyah al-Disūqī*, Vol. 4, p. 299; ʿAllīsh, *Minaḥ al-Jalīl*, Vol. 9, p. 201; Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 11; al-Mirdāwī, *Al-Inṣāf*, Vol. 10, p. 314; al-Buhūtī, *Kashshāf al-Qinā'*, Vol. 6, p. 164; al-Rahaybānī, *Maṭālib*, Vol. 6, p. 270; Ibn Ḥazm, *Al-Muḥallā*, Vol. 11, p. 102; Abū Zahrah, *Al-Jarīmah*, p. 131; ʿAwdah, *Al-Tashrī' al-Jinā'ī al-Islāmī*, Vol. 2, p. 695; ʿAwdah, *Criminal Law of Islam*, Vol. I, p. 119; Khadduri, *War and Peace*, p. 72; Lambton, *State and Government in Medieval Islam*, p. 211; Abou El Fadl, *Rebellion and Violence*, p. 238; Hashmi, "Islam, Sunni", p. 219.

[98] Al-Kāsānī, *Badā'i' al-Ṣanā'i'*, Vol. 7, p. 141; Ibn Mawdūd, *Al-Ikhtiyār*, Vol. 4, p. 161; ʿAwdah, *Al-Tashrī' al-Jinā'ī al-Islāmī*, Vol. 2, pp. 691, 693.

comes to an end.[99] The remaining majority of jurists maintain that after the cessation of hostilities, the captured rebels "could not be executed";[100] they must be unconditionally released, although some still stipulate that they should be released only after the rebels no longer have a *shawkah*.[101] This means that no trials or punishments await the rebels after the cessation of hostilities; in fact, the jurists make it clear that the rebels are simply to be set free.[102] Moreover, some Shāfiʿī jurists add that if the *dār al-ḥarb* captures and, consequently, enslaves a group of Muslim rebels, it is the Islamic state's obligation to fight the rebels' captors until they are liberated, provided that the Islamic state has the military capability to engage in a war with their captors.[103]

Concerning hostages, the jurists here unanimously agree that the state cannot execute them, even if the rebels kill the hostages they have taken.[104] This is based on the Qur'ānic dictum: "No sinful person shall be liable for the sin committed by another."[105] It is worth recalling here that the same ruling also applies in international armed conflicts, (see Chapter Four).[106] In this regard, the jurists refer to the precedent of the caliph Muʿāwiyah ibn Abī Sufyān (d. 60/680) when he refused

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[99] Ibn Mawdūd, *Al-Ikhtiyār*, Vol. 4, p. 161.
[100] Hashmi, "Islam, Sunni", p. 219.
[101] Al-Ghazālī, *Al-Wajīz*, Vol. 2, p. 164; al-Ghazālī, *Al-Waṣīt*, Vol. 6, p. 421; al-Buhūtī, *Kashshāf al-Qināʿ*, Vol. 6, p. 163; al-Rahaybānī, *Maṭālib*, Vol. 6, p. 270; Ibn Mufliḥ, *Al-Furūʿ*, Vol. 6, p. 149; al-Anṣārī, *Asnā al-Maṭālib*, Vol. 4, p. 114; ʿAwdah, *Criminal Law of Islam*, Vol. I, p. 118; Nik Wajis, "The Crime of *Ḥirāba* in Islamic Law", p. 153; Abou El Fadl, "Political Crime in Islamic Jurisprudence", p. 21.
[102] Jackson, "Domestic Terrorism in the Islamic Legal Tradition", p. 302.
[103] Al-Shāfiʿī, *Al-Umm*, Vol. 4, p. 222; al-Shirbīnī, *Mughnī al-Muḥtāj*, Vol. 4, p. 128; Abou El Fadl, *Rebellion and Violence*, p. 156.
[104] See, for example, al-Shāfiʿī, *Al-Umm*, Vol. 4, p. 222; al-Anṣārī, *Asnā al-Maṭālib*, Vol. 4, p. 114; al-Qarāfī, *Al-Dhakhīrah*, Vol. 12, p. 12; al-Buhūtī, *Kashshāf al-Qināʿ*, Vol. 6, pp. 162 f.; Abou El Fadl, *Rebellion and Violence*, p. 156; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 2, p. 1004.
[105] Qur'ān 6:164; 17:15; 35:18; 39:7; 53:38.
[106] See al-Shaybānī, *Al-Siyar*, p. 232; Farhad Malekian, *The Concept of Islamic International Criminal Law: A Comparative Study* (London: Graham & Trotman, 1994), pp. 72, 114 f. See also on the prohibition of "murder of hostages" Khaled Abou El Fadl, "Islam and the Theology of Power", *Middle East Report*, No. 221, Winter 2001, p. 30.

to execute the Roman hostages under his control after the Roman emperor had broken the treaty with the Muslims by executing the Muslim hostages he held.[107]

#### 5.2.1.3 Legitimacy of the Secessionists' Rule

It is interesting to find that the jurists of the four schools discuss the legitimacy of the rebels' rulings during their control over a territory of the Islamic state, i.e., before the Islamic state manages to retake it from the rebels. Here the jurists focus mainly on two issues: the legitimacy of the *zakāh* and other forms of taxes collected by the rebels from the population of such a territory, and the court rulings passed by judges appointed by the rebels. The jurists of the four schools unanimously agree that none of the taxes collected by the rebels can be re-collected from the population of such a territory.[108] The Shāfiʿī jurists, al-Shirbīnī and al-Ramlī, justify this by noting that the re-collection of these taxes would cause hardship to the population.[109] Al-Kāsānī gives a different justification, however: these taxes, al-Kāsānī argues, are paid to the Islamic state in return for the protection it provides to its population and, therefore, the state cannot re-collect these taxes because during the period of the rebels' control over the territory, the state provided no protection for its population.[110] But the Ḥanbalī jurist, al-Rahaybānī, justifies the impermissibility of re-collecting the taxes by merely indicating that this is what the fourth caliph did after retaking Basra from the rebels.[111]

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[107] Al-Qarāfī, *Al-Dhakhīrah*, Vol. 12, p. 12; al-Māwardī, *Al-Aḥkām al-Sulṭāniyyah*, p. 70.
[108] See, for example, al-Kāsānī, *Badā'iʿ al-Ṣanā'iʿ*, Vol. 7, p. 142; al-Shaykh Niẓām, *Al-Fatāwā al-Hindiyyah*, Vol. 2, p. 285; al-Shirbīnī, *Mughnī al-Muḥtāj*, Vol. 4, p. 125; al-Ramlī, *Nihāyah al-Muḥtāj*, Vol. 7, p. 405; al-Anṣārī, *Asnā al-Maṭālib*, Vol. 4, pp. 112 f.; al-ʿAbdarī, *Al-Tāj wa al- Iklīl*, Vol. 6, p. 279; Ibn ʿAbd al-Barr, *Al-Kāfī fī Fiqh Ahl al-Madīnah*, p. 222; Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 12; al-Rahaybānī, *Maṭālib*, Vol. 6, p. 271; ʿAwdah, *Al-Tashrīʿ al-Jinā'ī al-Islāmī*, Vol. 2, pp. 700 f.
[109] Al-Shirbīnī, *Mughnī al-Muḥtāj*, Vol. 4, p. 125; al-Ramlī, *Nihāyah al-Muḥtāj*, Vol. 7, p. 405.
[110] Al-Kāsānī, *Badā'iʿ al-Ṣanā'iʿ*, Vol. 7, p. 142.
[111] Al-Rahaybānī, *Maṭālib*, Vol. 6, p. 271.

More interestingly, all the court rulings issued by judges appointed by the rebels in any matter, such the application of *ḥudūd* punishments, marriage, divorce or financial transactions, will not be null and void after the state retakes the territory from the rebels as long as the rulings issued by these judges do not contradict Islamic law. But if these rulings do contradict Islamic law, then they are null and void, al-Shaybānī (d. 189/804-5) adds.[112] Moreover, it is interesting to note that the jurists do not contemplate the possibility of requiring the rebels to return to the state authorities the taxes they collected before the state retook control. This maybe explained, according to al-Kāsānī's logic, by arguing that the rebels deserve these taxes in return for their protection of the population, which also includes the maintenance of law and order. This full recognition of the rulings of the rebels and their judges, provided that they do not contradict Islamic law, proves that the rebels are not treated under Islamic law as criminals or terrorists.

#### 5.2.1.4 Liability for Destruction of Lives and Property

The most important issue in the discussion of the law of rebellion in Islam is the question of whether or not the rebels and/or the state are liable for the destruction of lives and property they cause during the course of an armed rebellion. The significance of the question of whether, specifically, the rebels are liable or not for the damage they cause during their recourse to violence is an indication of whether the jurists criminalize the recourse to armed rebellion or not. The jurists unanimously agree that the soldiers of the state army, understandably, are not liable for the

[112] See, for example, al-Shaybānī, *Al-Siyar*, p. 243; al-Shirbīnī, *Mughnī al-Muḥtāj*, Vol. 4, p. 125; al-Ramlī, *Nihāyah al-Muḥtāj*, Vol. 7, p. 405; al-Anṣārī, *Asnā al-Maṭālib*, Vol. 4, pp. 112 f.; al-ʿAbdarī, *Al-Tāj wa al- Iklīl*, Vol. 6, p. 279; Ibn ʿAbd al-Barr, *Al-Kāfī fī Fiqh Ahl al-Madīnah*, p. 222; al-Dardīr, *Al-Sharḥ al-Kabīr*, Vol. 4, p. 300; al-Disūqī, *Ḥāshiyah al-Disūqī*, Vol. 4, p. 299; Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 12; al-Buhūtī, *Kashshāf al-Qināʿ*, Vol. 6, p. 166; ʿAwdah, *Al-Tashrīʿ al-Jināʾī al-Islāmī*, Vol. 2, p. 702; Ḥammīdullāh, *Muslim Conduct of State*, pp. 179 f.

damage they cause to the lives and property of the rebels. This is obviously because it is the state's obligation to maintain security and stability. But the mere fact that the classical jurists discuss whether the state is liable or not for any such damage they cause to the rebels indicates that the jurists endeavour to regulate the state's use of violence against the rebels and to make any violations subject to the law. More interestingly, however, the jurists are also almost unanimous in the opinion that the rebels are not liable for any damage they cause to lives and property during the course of the armed rebellion. That is to say, the rebels are not held criminally responsible for any killings or destruction of property directly linked to the rebellion.[113] It nevertheless follows that the rebels will be liable for any deaths or destruction they cause before or after the rebellion or, in other words, that are not dictated by the military necessity of battle during the rebellion.[114] By the same token, the state soldiers are also liable for any such killings or destruction.[115] It is worth bearing in mind here that the jurists are referring to rebels who have a *ta'wīl*, a just cause for the rebellion in their opinion,[116] because obviously those who resort to

[113] Al-Kāsānī, *Badā'iʿ al-Ṣanā'iʿ*, Vol. 7, p. 141; al-Samarqandī, *Tuḥfah al-Fuqahā'*, Vol. 3, pp. 313 f.; Ibn Najīm, *Al-Baḥr al-Rā'iq*, Vol. 5, p. 154; Ibn Mawdūd, *Al-Ikhtiyār*, Vol. 4, p. 162; al-Shaykh Niẓām, *Al-Fatāwā al-Hindiyyah*, Vol. 2, p. 284; al-Shirāzī, *Al-Muhadhdhab*, Vol. 3, p. 253; al-Shirbīnī, *Al-Iqnāʿ*, Vol. 2, p. 549; al-Shirbīnī, *Mughnī al-Muḥtāj*, Vol. 4, p. 125; al-Māwardī, *Al-Aḥkām al-Sulṭāniyyah*, p. 82; al-Ramlī, *Nihāyah al-Muḥtāj*, Vol. 7, p. 405; al-Anṣārī, *Asnā al-Maṭālib*, Vol. 4, p. 113; Ibn ʿAbd al-Barr, *Al-Kāfī fī Fiqh Ahl al-Madīnah*, p. 222; al-Qarāfī, *Al-Dhakhīrah*, Vol. 12, p. 10; al-Ṣāwī, *Bulghah al-Sālik*, Vol. 4, p. 222; al-Dardīr, *Al-Sharḥ al-Kabīr*, Vol. 4, p. 300; Ibn Qudāmah, *Al-Mughnī*, Vol. 9, pp. 8 f.; al-Mirdāwī, *Al-Inṣāf*, Vol. 10, pp. 316 f.; Ibn Mufliḥ, *Al-Furūʿ*, Vol. 6, pp. 149 f.; al-Buhūtī, *Kashshāf al-Qināʿ*, Vol. 6, p. 165; al-Rahaybānī, *Maṭālib*, Vol. 6, p. 270; Ibn Ḥazm, *Al-Muḥallā*, Vol. 11, p. 105; Abū Zahrah, *Al-Jarīmah*, p. 131; ʿAwdah, *Al-Tashrīʿ al-Jinā'ī al-Islāmī*, Vol. 2, p. 698; al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 2, pp. 1010 f.; Ḥammīdullāh, *Muslim Conduct of State*, p. 180; Abou El Fadl, "Political Crime in Islamic Jurisprudence", pp. 17 f., 21; Abou El Fadl, *Rebellion and Violence*, p. 238; Jackson, "Domestic Terrorism in the Islamic Legal Tradition", p. 302.

[114] Al-Shirbīnī, *Mughnī al-Muḥtāj*, Vol. 4, p. 125; al-Ramlī, *Nihāyah al-Muḥtāj*, Vol. 7, p. 405; al-Māwardī, *Al-Aḥkām al-Sulṭāniyyah*, p. 82; Abou El Fadl, "Political Crime in Islamic Jurisprudence", pp. 17 f., 21; Jackson, "Domestic Terrorism in the Islamic Legal Tradition", p. 302.

[115] Al-Ghazālī, *Al-Wajīz*, Vol. 2, p. 164; al-Shirbīnī, *Al-Iqnāʿ*, Vol. 2, p. 549; al-Ramlī, *Nihāyah al-Muḥtāj*, Vol. 7, p. 405; al-Baʿlī, *Kashf al-Mukhaddarāt*, Vol. 2, p. 775.

[116] Abū Zahrah, *Al-Jarīmah*, p. 131.

violence without a justification will certainly be held liable for any killings or destruction they cause.[117]

The fact that the jurists unanimously agree that rebels are not liable for any killings or destruction they cause during the course of the rebellion proves that rebels are not treated as criminals and are even elevated to the same status as the soldiers in the state army, provided they have a justification for their rebellion and popular support. Moreover, the rebels must not target non-combatants or civilians or cause any wanton destruction not dictated by the military necessity. This immunity of the rebels from liability for the deaths and damage to property that they cause is a privilege given exclusively to rebels because, in their view, their rebellion has a just cause. Undoubtedly, this treatment of rebels indicates that Islamic law permits the recourse to rebellion against an Islamic government if a considerable part of its people believes that their government is committing injustice or wrongdoing. In fact, the recognition of the people's right to resort to rebellion, and the magnanimity with which the classical Muslim jurists deal with the rebels, prove that, under Islamic law, the citizens of the Islamic state are entitled to challenge the tyranny, injustice and oppression of their government.

#### 5.2.1.5 Punishment for Rebellion?

This generous treatment of rebels under classical Islamic law stands in stark contrast to the treatment of rebels in the Western tradition of war. Throughout history, rebels in the West were treated as criminals because they were seen as a threat to the political order and stability, Kelsay explains.[118] Thus, according to Abou El Fadl, the punishment of political criminals in pre-nineteenth century French and German laws

[117] See, for example, al-Dardīr, *Al-Sharḥ al-Kabīr*, Vol. 4, p. 300.
[118] Kelsay, *Islam and War*, pp. 78-81.

included the confiscation of the offenders' property and the banishment of their families.[119] In France, he adds, the confiscation of the offenders' property was abolished in the revised penal code of 28 April 1832 and "the death penalty was abolished for some political offenses in 1848. [Nevertheless, it] … was re-introduced for violent political crimes in the wake of World War II."[120] Despite the fact that the classical Muslim jurists, like their Western counterparts, were most concerned about the danger of instability and the shedding of blood, they never criminalized the recourse to rebellion. This leads Kelsay to conclude that: "Islamic thinkers prefigured (by nearly a thousand years) Lieber's conclusion that participation in a rebellion does not, in and of itself, make one a criminal."[121] The *jus ad bellum* and the *jus in bello* governing the recourse to rebellion in Islam serve as mechanisms that ensure, first, that those who resort to rebellion against the state have a potential just cause and some degree of popular support. These differentiate rebels from criminals. Second, these mechanisms attempt to limit the use of force during the course of the rebellion.

Thus, in contrast to their Western counterparts, Muslim rebels' cannot forfeit their money and property[122] and, as explained above, the state cannot even use the rebels' weapons to fight against them except in cases of dire military necessity. Furthermore, any weapons or other property confiscated from the rebels during the war must be returned to them after the cessation of hostilities. More importantly, any rebels detained during the course of an armed rebellion must be set free after the cessation of hostilities, unless they are likely to regroup or join another group in order to continue the fighting. All the above discussion proves beyond doubt that,

[119] Abou El Fadl, "Political Crime in Islamic Jurisprudence", p. 4.
[120] Ibid., pp. 5 f.
[121] Kelsay, *Islam and War,* p. 93.
[122] See Abou El Fadl, "Political Crime in Islamic Jurisprudence", p. 21.

under Islamic law, there is no punishment for the recourse to armed rebellion[123] and any deaths or destruction caused by the rebels during the course of the rebellion, provided that these killings or damage were directed at military or government targets with the aim of achieving the objective of the rebellion, i.e., overthrowing the government. This lack of punishment for rebels also increases the mystery and leaves unanswered the intriguing question of why the Mālikī and Ḥanbalī jurists treat the law of rebellion under the category of *ḥudūd* crimes, specifically since *ḥudūd* crimes, by definition, are crimes for which specific punishments are prescribed in the Qur'ān or the ḥadīth.

Concerning the fifth question posed at the beginning of this chapter on the differences between the *jus in bello* norms regulating international armed conflicts and those regulating domestic conflicts, the most salient differences are, first, the prohibition of the confiscation of the rebels' property and weapons, while in international conflicts the enemy's property becomes spoils of war. Second, the jurists are unanimous in the view that rebels are to be set free after the cessation of fighting, but regarding prisoners of war in international conflicts, the jurists give the ruler various options, such as freely releasing them or exchanging them for Muslim prisoners or ransom, as maintained by one group of jurists, or executing or enslaving them, according to a second group of jurists, or all of the above options for a third group.[124] Third, captured rebels and their families cannot be enslaved, unlike captured enemy combatants in international armed conflicts. Fourth, the Islamic state should not accept the support of non-Muslims in fighting against Muslim rebels, in contrast to international conflicts, where the Islamic state can accept the support of

[123] According to the words of Abou El Fadl: "There is no legal penalty for rebellion, and the rebel is fought only because of the necessity of maintaining order and stability", Abou El Fadl, *Rebellion and Violence*, p. 157. See also Jackson, "Domestic Terrorism in the Islamic Legal Tradition", p. 302.
[124] See Chapter Four.

non-Muslims.[125] Concerning the most salient similarities, the principle of non-combatant immunity and the rules for the treatment of hostages are almost exactly the same in both domestic and international conflicts.

Studies of the law of war in Islam in both insider and outsider literatures have mainly focused on international war, i.e., jihād against non-Muslims. Too little attention has been given to the study of internal hostilities under Islamic law, despite the fact that after the liberation of the Muslim countries from European occupation, civil conflicts or what is now called by some "jihād against the near enemy", i.e., the regimes of Muslim countries, has become the dominant form of the use of force in the Muslim world.[126] Apart from politically motivated inter-Muslim state conflicts, the use of violence against the regimes in Muslim countries has been motivated by the desire to Islamize such countries by establishing an Islamic government and the application of Islamic law.[127] In this regard, a small pamphlet entitled "Al-Farīḍah al-Ghā'ibah" has received much attention in Western scholarship, partly because, unlike the vast majority of modern Islamic literature, it has been translated into English, by the Dutch scholar Johannes J.G. Jansen under the title "The Neglected

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[125] It is worth noting here that it is mainly the Mālikī jurists who make this comparison between the rules of fighting against rebels and against unbelievers, *al-kuffār*. See from the Mālikī jurists, for example, al-ʿAbdarī, *Al-Tāj wa al- Iklīl*, Vol. 6, pp. 276 f.; al-Qarāfī, *Al-Dhakhīrah*, Vol. 12, p. 9; al-Disūqī, *Ḥāshiyah al-Disūqī*, Vol. 4, p. 299; al-Ṣāwī, *Bulghah al-Sālik*, Vol. 4, p. 222; ʿAllīsh, *Minaḥ al-Jalīl*, Vol. 9, p. 200; Mahmassani, *Al-Qānūn wa al-ʿAlāqāt*, p. 198. See from the Shāfiʿī jurists, al-Māwardī, *Al-Aḥkām al-Sulṭāniyyah*, pp. 80-82.

[126] Current Western literature focuses mainly on the study of the fundamentalist or terrorist groups and organizations, while ignoring the Islamic legal treatment of their ideas, as discussed below. Because of his background as a Lebanese Christian who has lived in both the Muslim world and the West, the following excellent works of Fawaz A. Gerges are the most illuminating for understanding the nature, history and mentality of these groups. See, Fawaz A. Gerges, *The Far Enemy: Why Jihad Went Global* (Cambridge: Cambridge University Press, 2005); Fawaz A. Gerges, *Journey of the Jihadist: Inside Muslim Militancy* (Orlando, Fla.: Harcourt, 2006); Fawaz A. Gerges, "Understanding the Many Faces of Islamism and Jihadism", *Nieman Reports*, Summer 2007, 61, 2, p. 7. See also, for example, Gilles Kepel, *The Revenge of God: The Resurgence of Islam, Christianity and Judaism in the Modern World* (Cambridge: Policy Press, 1994); Gilles Kepel, *Jihad: The Trial of Political Islam*, trans. Anthony F. Roberts (London: I.B. Tauris, 2002); Gilles Kepel, *The Roots of Radical Islam*, trans. Jon Rothschild, New Preface ed. (London: Saqi, 2005).

[127] In the words of Hashmi, "The focus of [contemporary] fundamentalist argument on war is thus inward, aimed at transforming allegedly hypocritical Muslim societies into true Islamic communities, led by true Muslim leaders", Hashmi, "Islam, Sunni", p. 221. See also Gerges, *The Far Enemy*, pp. 9-12.

Duty", i.e., jihād.[128] The author of this pamphlet, who coined the dichotomous terms 'the near enemy'/'far enemy', is Muḥammad ʿAbd al-Salām Faraj, an electrical engineer and graduate of Cairo University, who was executed on 15 April 1982 for his alleged role in the assassination of President Sadat of Egypt.[129]

The main theme of this pamphlet is the resort to jihād against regimes in Muslim countries in order to establish a *genuinely* Islamic government.[130] Thus, Faraj claims that overthrowing regimes in Muslim countries (the near enemy) should take priority over liberating the holy land in Jerusalem from the far enemy, i.e., the non-Muslim enemy.[131] Apart from this novel claim, the pamphlet contains no solid arguments or any other clear thesis. As some have noted, it consists mainly of a collection of quotations, mostly from Ibn Taymiyyah, the Qur'ān and Ḥadīth.[132] The ideas in the pamphlet are rejected as heretical by prominent scholars, and they also show the lack of a correct understanding, and even the proper use, of the Arabic language.[133] But the core point, and hence the core criticism, of the pamphlet is that

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[128] See J.J.G. Jansen, *The Neglected Duty: The Creed of Sadat's Assassins and Islamic Resurgence in the Middle East* (New York: Macmillan, 1986); see also J.J.G. Jansen, "The Creed of Sadat's Assassins: The Contents of 'The Forgotten Duty' Analysed", *Die Welt des Islam*, New Series, Bd. 25, No. 1/4. 1985, pp. 1-30.

[129] Jansen, "The Creed of Sadat's Assassins", p. 1; Gerges, *The Far Enemy*, pp. 9-12, 44.

[130] Muḥammad ʿAbd al-Salām Faraj, "Wathīqah al-Farīḍah al-Ghā'ibah", published in Rifaat Sayed Ahmed, *Al-Nabī al-Musallaḥ (1): Al-Rāfiḍūn* (London: Riad El-Rayyes Books, 1991), pp. 127-129; Muḥammad ʿAbd al-Salām Faraj, "Al-Farīḍah al-Ghā'ibah", published in *Al-Fatāwā al-Islamiyyah min Dār al-Iftā' al-Miṣriyyah* (Cairo: Al-Ahram Commercial Prints, 1993/1414), Vol. 10, pp. 3762 f.; Muḥammad ʿAbd al-Salām Faraj, "Translation of Muḥammad ʿAbd al-Salām Faraj's Text Entitled Al-Farīḍah Al-Ghā'ibah", trans. J.J.G. Jansen in his, *The Neglected Duty: The Creed of Sadat's Assassins and Islamic Resurgence in the Middle East* (New York: Macmillan, 1986), pp. 162-166. See also Muḥammad ʿImārah, *Al-Farīḍah al-Ghā'bah: ʿArḍ wa Ḥiwār wa Taqyym* (Cairo: Dār Thābit, 1982/1402), pp. 12-16; Kepel, *The Roots of Radical Islam*, p. 200; Alsumaih, "The Sunni Concept of Jihad", pp. 4, 296, 298. It is worth adding here that Sohail H. Hashmi notes that "*Jihad* in the contemporary fundamentalist discourse has emerged as an instrument not for the diffusion of the faith, but for its defence against a host of home-grown enemies who are blamed for Muslim weakness in the international arena." See Sohail H. Hashmi, "International Society and its Islamic Malcontents", *Fletcher Forum of World Affairs*, Vol. 20, 1996, p. 19.

[131] Faraj, "Wathīqah al-Farīḍah al-Ghā'ibah", p. 136; Faraj, "Al-Farīḍah al-Ghā'ibah", p. 3775; Faraj, "Translation of Muḥammad ʿAbd al-Salām Faraj's Text Entitled Al-Farīḍah Al-Ghā'ibah", pp. 192 f. See Kepel, *The Roots of Radical Islam*, p. 12; Alsumaih, "The Sunni Concept of Jihad", p. 299.

[132] See Kepel, *The Roots of Radical Islam*, pp. 200, 203; Jansen, *The Neglected Duty*, pp. 4 f.

[133] See Jād al-Ḥaqq ʿAlī Jād al-Ḥaqq, "Kutayyib al-Farīḍah al-Ghā'ibah wa al-Radd ʿalaiyh", in *Al-Fatāwā al-Islamiyyah min Dār al-Iftā' al-Miṣriyyah* (Cairo: Al-Ahram Commercial Prints,

it applies Ibn Taymiyyah's *fatwa* allowing fighting against the Tartars to current Muslim leaders.[134] For Faraj, current Muslim rulers, like the Tartars, do not apply Islamic law. Hence, the Muslim "Rulers of this age are in apostasy from Islam. They were raised at the tables of imperialism, be it Crusaderism, or Communism, or Zionism", Faraj claims.[135] The significance of Faraj's pamphlet is that its claims sum up and, in fact, characterize the main struggle of the Muslim world since its independence. It is an internal struggle between various trends that want to re-Islamize their de-Islamized societies and their regimes, which are seen as agents of non-Muslim foreign powers. That is to conclude here that, first, apart from the liberation of occupied Muslim territories, warfare in the Muslim world has been directed inward. In other words, civil conflicts and domestic terrorism will remain the dominant form of the use of force in the Muslim world, at least in the near future. Second, one of the main reasons for the potential continuation of this internal struggle is the absence of true and genuine experience of democracy in a large part of the Muslim world. This means, third, that democracy and/or a framework for a peaceful process of negotiation with opponents of the regime before they resort to violence, as is secured for the *bughāh* under classical Islamic law, could have prevented a large number of these opponents from becoming terrorists.

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1993/1414), Vol. 10, pp. 3724-3759; ʿImārah, *Al-Farīḍah al-Ghā'bah: ʿArḍ wa Ḥiwār wa Taqyym*. See also Jansen, *The Neglected Duty*, p. 4.

[134] Jād al-Ḥaqq, "Kutayyib al-Farīḍah al-Ghā'ibah wa al-Radd ʿalaiyh", pp. 3746 f.; ʿImārah, *Al-Farīḍah al-Ghā'bah: ʿArḍ wa Ḥiwār wa Taqyym*, pp. 47-56. See Jansen, *The Neglected Duty*, p. 4; Kepel, *The Roots of Radical Islam*, pp. 200-203; Salwa Muḥammad El-Awa, *Al-Jamāʿah al-Islāmiyyah al-Musallaḥah fī Miṣr: 1974-2004* (Cairo: Maktabah al-Shurūq al-Dawliyyah, 2006/1427), p. 89.

[135] Faraj, "Translation of Muḥammad ʿAbd al-Salām Faraj's Text Entitled Al-Farīḍah Al-Ghā'ibah", p. 169; Faraj, "Wathīqah al-Farīḍah al-Ghā'ibah", p. 130; Faraj, "Al-Farīḍah al-Ghā'ibah", p. 3765. See also Kepel, *The Roots of Radical Islam*, p. 203.

### 5.2.2 Battle against *al-Muḥāribūn/Quṭṭāʿ al-Ṭarīq*

The second most important kind of domestic conflict is the battle against *quṭṭāʾ al-ṭarīq*/*al-muḥāribūn* (bandits, highway robbers, pirates). Here, the state uses force against a group of citizens of the Islamic state who commit the crime termed "*qaṭʾ al-ṭarīq*" by both the Ḥanafīs[136] and the Shāfiʿīs[137] and termed "*al-ḥirābah*" by the Mālikīs[138] and the Ḥanbalīs.[139] A few jurists, mainly of the Ḥanafī school, also call this crime "*al-sariqah al-kubrā*" (the great theft).[140] The basis of the Islamic treatment of this sort of domestic violence is wholly scriptural. According to the Qur'ān:

> Indeed, the retribution for those who *yuḥāribūn* (make war upon) God and His Messenger and strive to make *fasād*[141] (destruction, damage) in the land is that they be killed *or* [emphasis added here and below] gibbeted *or* have their hands and feet amputated from opposite sides *or* they be banished from the land; this is a degradation for them in this world and in the Hereafter they will receive a grave chastisement. Excluded [from this retribution] are those

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[136] See from the Ḥanafī school, for example, Muḥammad ibn Aḥmad ibn Abī Sahl al-Sarakhsī, *Kitāb al-Mabsūt* (Beirut: Dār al-Maʿrifah, n. d.), Vol. 9, pp. 195-205; al-Kāsānī, *Badā'iʾ al-Ṣanā'iʾ*, Vol. 7, pp. 90-97; Ibn Najīm, *Al-Baḥr al-Rā'iq*, Vol. 5, pp. 72-76.

[137] See from the Shāfiʿī school, for example, al-Anṣārī, *Manhaj al-Ṭullāb*, p. 128; al-Ghazālī, *Al-Wajīz*, Vol. 2, pp. 177-179; al-Ghazālī, *Al-Waṣīt*, Vol. 6, pp. 491-503.

[138] See from the Mālikī school, for example, al-ʿAbdarī, *Al-Tāj wa al- Iklīl*, Vol. 6, pp. 314-317; al-Dardīr, *Al-Sharḥ al-Kabīr*, Vol. 4, pp. 348-352; al-Qarāfī, *Al-Dhakhīrah*, Vol. 12, pp. 123-140; al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, Vol. 6, pp. 314-317; ʿAllīsh, *Minaḥ al-Jalīl*, Vol. 9, pp. 335-348.

[139] See from the Ḥanbalī school, for example, Ibn Qudāmah, *ʾUmdah al-Fiqh*, p. 149; al-Mirdāwī, *Al-Inṣāf*, Vol. 10, pp. 291-299; Ibn Mufliḥ, *Al-Mubdiʾ*, Vol. 9, pp. 144-154; al-Buhūtī, *Kashshāf al-Qināʾ*, Vol. 6, pp. 149-154.

[140] See, for example, al-Sarakhsī, *Kitāb al-Mabsūt*, Vol. 9, pp. 133, 176, 195; Ibn Mawdūd, *Al-Ikhtiyār*, Vol. 4, p. 109; Ibn Najīm, *Al-Baḥr al-Rā'iq*, Vol. 5, p. 72; Ibn ʿĀbidīn, *Ḥāshiyah Radd al-Muḥtār*, Vol. 4, p. 116. See also Mohamed S. El-Awa, *Punishment in Islamic Law: A Comparative Study* (Indianapolis, Ind.: American Trust Publications, 1993), p. 12; Nik Wajis, "The Crime of *Ḥirāba* in Islamic Law", p. 63.

[141] Most of the translators of the meaning of the Qur'ān translate the concept *fasād* here as corruption or mischief, but the meaning of *fasād* in this verse is far different from these translations, as can be learnt from the occasion of the revelation of this verse, as shown below.

who repent before you capture them; and be sure that God is All-Forgiving All-Merciful.[142]

Exegetes relate several different occasions of revelation for these two verses. Among these occasions, according to some reports, these verses address a group of People of the Book who broke a peace treaty with the Prophet and caused *fasād* in the land, while according to other reports they address a group of polytheists. But most of the exegetes maintain that these verses address a group from the clan/s of ʿUraynah and/or ʿUkal who came to the Prophet and adopted Islam. When they asked the Prophet to support them, he gave them some "charity's camels" and sent with them a Nubian shepherd called Yāsir. Several days later, they apostatized and cut off the hands and feet of the shepherd and inserted thorns into his eyes until he died and then they stole the camels and escaped. Some sources add that, in their escape, they terrorized the streets (*akhāfūā al-sabīl*).[143] After they were captured, the Prophet planned to serve them as they had served the shepherd, while in other sources he actually did so. In this context, most of the exegetes and jurists maintain that these two verses revealed to the Prophet the punishment for such criminals.[144]

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[142] Qur'ān 5:33-34.

[143] Ibn Kathīr, *Tafsīr*, Vol. 2, p. 50.

[144] See on the occasion of revelation of these two verses, for example, al-Ṭabarī, *Jāmiʿ al-Bayān*, Vol. 6, pp. 205-210; Ibn Kathīr, *Tafsīr*, Vol. 2, pp. 49-51; al-Qurṭubī, *Al-Jāmiʿ*, Vol. 6, pp. 147-150; Muḥammad ibn ʿAbd Allah al-Zarkashī, *Sharḥ al-Zarkashī ʿalā Mukhtaṣar al-Khiraqī*, ed. ʿAbd al-Munʿim Khalīl Ibrāhīm (Beirut: Dār al-Kutub al-ʿIlmiyyah, 2002/1423), Vol. 3, p. 136; Muḥammad ibn ʿUmar al-Rāzī, *Al-Tafsīr al-Kabīr aw Mafātīḥ al-Ghayb* (Beirut: Dār al-Kutub al-ʿIlmiyyah, 2000/1421), Vol. 11, p. 169; al-Samarqandī, *Baḥr al-ʿUlūm*, Vol. 1, p. 410; al-Suyūṭī, *Al-Durr al-Manthūr*, Vol. 3, pp. 66-68; al-Ṣanaʿānī, *Tafsīr al-Qur'ān*, Vol. 1, p. 188; ʿAllīsh, *Minaḥ al-Jalīl*, Vol. 9, p. 337; Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 124; al-Mirdāwī, *Al-Inṣāf*, Vol. 10, pp. 291 f.; al-Buhūtī, *Kashshāf al-Qināʿ*, Vol. 6, p. 150; Ibn ʿAbd al-Wahhāb, *Mukhtaṣar al-Inṣāf*, p. 721; Ibn Ḥazm, *Al-Muḥallā*, Vol. 11, pp. 300 f.; Muḥammad ibn Aḥmad ibn Muḥammad ibn Rushd, *Bidāyah al-Mujtahid wa Nihāyah al-Muqtaṣid* (Beirut: Dār al-Fikr, n.d.), Vol. 2, p. 340; Riḍā, *Tafsīr al-Manār*, Vol. 6, pp. 352-355; ʿAwdah, *Al-Tashrīʿ al-Jināʾī al-Islāmī*, Vol. 2, p. 639; Nik Wajis, "The Crime of *Ḥirāba* in Islamic Law", pp. 61-63; Abou El Fadl, *Rebellion and Violence*, pp. 47-53.

Irrespective of which of these several incidents is the authentic occasion of revelation and irrespective of the many discrepancies in the incident[145] maintained by most of the exegetes to be the occasion of revelation of these two verses, Muslim jurists are unanimous in their view that these verses are the basis of the treatment and punishment of the law of *ḥirābah*/*qaṭʹ al-ṭarīq* in Islam.[146] Hence this text is known as the *ḥirābah* verse. The term *ḥirābah* comes from the verb *yuḥāribūn*, used in the verse above, which is derived from the noun *ḥarb* (war). Thus, it denotes here that the perpetrators of this crime wage war against society.[147] However, the Ḥanbalī jurists Ibn Mufliḥ (d. 763/1362) and al-Buhūtī (d. 1051/1641) indicate that this term is derived from the verb *ḥarab*, meaning to despoil or take wealth by force.[148]

Concerning the technical juristic definition of *ḥirābah*, the jurists commonly agree on the following main characteristics of the perpetrators of this crime as:

> a group of Muslims who under the threat, or use, of arms attack or merely intimidate or terrorize their victims in order to overtly and forcefully rob, kill or merely terrorize their victims.[149]

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[145] It is worth adding here that Abou El Fadl repeatedly affirms that this so-called ʿUraynah incident was invented by the Umayyads (r. 661-750) for political purposes, i.e., to sanction a harsh punishment against their political enemies. See Abou El Fadl, *Rebellion and Violence*, pp. 53, 59, 61.

[146] However, strangely enough, Muḥammad Saʿīd al-ʿAshmāwī, an Egyptian former judge and author of books on Islam, denies the law of *ḥirābah* altogether. He holds that the *ḥirābah* verse refers only to those who fight against the person of the Prophet and God's religion and, therefore, does not warrant applying the punishment prescribed in it to any others, including highway robbers. See Muḥammad Saʿīd al-ʿAshmāwī, *Uṣūl al-Sharīʹah*, 4th ed. (Cairo: Madbūlī al-Ṣaghīr, 1996/1416), pp. 128-130.

[147] Abū Zahrah, *Al-ʹUqūbah*, p. 140.

[148] Ibn Mufliḥ, *Al-Mubdiʹ*, Vol. 9, p. 144; al-Buhūtī, *Kashshāf al-Qināʹ*, Vol. 6, p. 150; Riḍā, *Tafsīr al-Manār*, Vol. 6, p. 356. See Edward William Lane, *An Arabic-English Lexicon* (Beirut: Librairie Du Liban, 1968), Vol. 2, p. 540.

[149] For the definition of *ḥirābah* see, for example, al-Kāsānī, *Badā'iʹ al-Ṣanā'iʹ*, Vol. 7, p. 90; al-Sarakhsī, *Kitāb al-Mabsūt*, Vol. 9, p. 195; Ibn Mawdūd, *Al-Ikhtiyār*, Vol. 4, p. 122; Ibn ʿĀbidīn, *Ḥāshiyah Radd al-Muḥtār*, Vol. 4, pp. 113-116; al-Shāfiʿī, *Al-Umm*, Vol. 6, p. 152; al-Māwardī, *Al-Aḥkām al-Sulṭāniyyah*, p. 84; al-ʿAbdarī, *Al-Tāj wa al- Iklīl*, Vol. 6, p. 314; al-Dardīr, *Al-Sharḥ al-Kabīr*, Vol. 4, p. 348; al-Qarāfī, *Al-Dhakhīrah*, Vol. 12, p. 123; al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, Vol. 6, p. 314; ʿAllīsh, *Minaḥ al-Jalīl*, Vol. 9, p. 335; Ibn Qudāmah, *'Umdah al-Fiqh*, p. 149; al-Zarkashī, *Sharḥ al-Zarkashī*, Vol. 3, p. 137; al-Mirdāwī, *Al-Inṣāf*, Vol. 10, p. 291; al-Buhūtī, *Al-Rawḍ al-Murbiʹ*, Vol. 3, p. 330; Ibn Mufliḥ, *Al-Furūʹ*, Vol. 6, p. 137; Ibn Muflih, *Al-Mubdiʹ*, Vol. 9, p. 145; al-Buhūtī, *Kashshāf al-Qināʹ*, Vol. 6, p. 150; al-Rahaybānī, *Maṭālib*, Vol. 6, p. 251; Muḥammad ibn Jarīr al-Ṭabarī, *Kitāb al-Jihād wa Kitāb al-Jizyah wa Aḥkām al-Muḥāribīn min Kitāb Ikhtilāf al-Fuqahā' li-Abī Jaʹfar Muḥammad Ibn Jarīr al-Ṭabarī*, ed. Joseph Schacht (Leiden: Brill, 1933), p. 251; Ibn

However, the jurists of the different schools typically differ on the nuances of the definitions of *ḥirābah*. The Ḥanafīs focused on the taking of money by force as the usual objective of this crime and the fact that it causes people to feel intimidated about using roads where highwaymen are active. This focus may be the result of Abū Ḥanīfah's restricting the application of the law of *ḥirābah* to certain crimes committed in the desert or in unpopulated areas, discussed below.

The Shāfiʿī and Ḥanbalī jurists emphasise the element of the criminals' use of arms – Ḥanbalīs add even a stick or a stone – *mujāharah*[150] (overtly, openly, unlike thieves and other criminals). This shows a sort of *mukābarah*, a determination on the part of the criminals to challenge the state authorities.[151] Here both the Shāfiʿī and Ḥanbalī jurists agree with their Ḥanafī counterparts that the criminals depend on a sort of force, expressed by the Ḥanafī and Shāfiʿī jurists by the terms *manʻah*[152] and *shawkah* (power)[153] which the criminals possess, and by the Ḥanbalīs in terms of arms. Again, it is worth bearing in mind that this whole discussion addresses a crime in which the victims are ordinary innocent civilians who are attacked or terrorized in a context where they are helpless (*lā yalḥaquhum al-ghawth*).[154] Furthermore, the victims are not attacked or terrorized because of any wrongdoing on their part. It is interesting to note that some Shāfiʿī jurists mention in their definition of this crime,

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Rushd, *Bidāyah al-Mujtahid*, Vol. 2, p. 340; Riḍā, *Tafsīr al-Manār*, Vol. 6, p. 358; Abū Zahrah, *Al-ʻUqūbah*, pp. 141-148; ʿAwdah, *Al-Tashrīʻ al-Jināʼī al-Islāmī*, Vol. 2, pp. 639-641; Nik Wajis, "The Crime of *Ḥirāba* in Islamic Law", pp. 63 f.; Abou El Fadl, *Rebellion and Violence*, p. 253; Jackson, "Domestic Terrorism in the Islamic Legal Tradition", p. 295; Vogel, "The Trial of Terrorists under Classical Islamic Law", pp. 58 f.

[150] Ibn Qudāmah, *Al-Mughnī*, Vol. 9, pp. 124 f. See also Riḍā, *Tafsīr al-Manār*, Vol. 6, pp. 358 f.; Abū Zahrah, *Al-ʻUqūbah*, pp. 146 f.

[151] On this point, Abū Zahrah argues that "every crime which involves the use of organized force is a challenge to the rightful authorities; and this challenge is considered, undoubtedly, *muḥārabah Lillah wa Rasūluh* [i.e., *ḥirābah*]", Abū Zahrah, *Al-ʻUqūbah*, p. 156. See also al-Ḥaqīl, *Haqīqah Mawqif al-Islām*, p. 146.

[152] Ibn Mawdūd, *Al-Ikhtiyār*, Vol. 4, pp. 121, 123; al-Rāzī, *Al-Tafsīr al-Kabīr*, Vol. 11, p. 169.

[153] From the Shāfiʿī school, see al-Ramlī, *Nihāyah al-Muḥtāj*, Vol. 8, p. 3; al-Anṣārī, *Asnā al-Maṭālib*, Vol. 4, p. 154; al-Ghazālī, *Al-Wajīz*, Vol. 2, p. 177; al-Ghazālī, *Al-Waṣīt*, Vol. 6, pp. 492-494. See also Riḍā, *Tafsīr al-Manār*, Vol. 6, pp. 356, 366.

[154] Al-Ramlī, *Nihāyah al-Muḥtāj*, Vol. 8, p. 4; Ibn Qudāmah, *Al-Mughnī*, Vol. 9, pp. 124 f.

along with the taking of money by force or murder, the term *irhāb*,[155] the same word used in modern Arabic for terrorism, as one of the intentions behind this crime.

More than any of the other schools,[156] the Mālikī jurists explicitly emphasise the importance of the element of spreading terror among the victims as a principal intention behind this crime, even, these Mālikī jurists add, if the criminals do not intend to rob their victims.[157] The example often given by the Mālikī jurists here to elucidate this element is that a group of criminals may attempt to intimidate a group of people or an individual from taking a certain route to Syria, for example.[158] Here also the Mālikī jurists state that the victims of such a crime are rendered helpless.[159] Interestingly, the Mālikī jurists include under the law of *ḥirābah* the crimes of killing by stealth, poisoning and armed burglary, because the victims are helpless. For example, if a criminal lures a child or a man to enter a place from which rescue is not feasible so that he can rob and kill the victim, the criminal will be punished under the law of *ḥirābah*. Similarly, if a criminal breaks into a house by night and prevents its inhabitants from calling for help – or poisons someone, al-Qarāfī adds, – in order to steal their money, he will be also punished under the law of *ḥirābah*.[160]

Furthermore, the jurists' discussion of the scene of the crime of *ḥirābah* further indicates the importance of the fact that the criminals render their victims

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[155] Al-Ramlī, *Nihāyah al-Muḥtāj*, Vol. 8, p. 3; al-Shirwānī, *Ḥawāshī al-Shirwānī*, Vol. 9, p. 157.
[156] Nik Wajis, "The Crime of *Ḥirāba* in Islamic Law", p. 70; Jackson, "Domestic Terrorism in the Islamic Legal Tradition", pp. 297 f.
[157] See, for example, al-Qarāfī, *Al-Dhakhīrah*, Vol. 12, p. 125; al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, Vol. 6, p. 314; al-Dardīr, *Al-Sharḥ al-Kabīr*, Vol. 4, p. 348; al-Disūqī, *Ḥāshiyah al-Disūqī*, Vol. 4, p. 348; ʿAllīsh, *Minaḥ al-Jalīl*, Vol. 9, p. 340; Ibn Ḥazm, *Al-Muḥallā*, Vol. 11, p. 97; Abū Zahrah, *Al-Jarīmah*, p. 126; ʿAwdah, *Al-Tashrīʿ al-Jināʾī al-Islāmī*, Vol. 2, pp. 639 f.; Nik Wajis, "The Crime of *Ḥirāba* in Islamic Law", pp. 63, 70; Jackson, "Domestic Terrorism in the Islamic Legal Tradition", p. 297.
[158] Al-ʿAbdarī, *Al-Tāj wa al- Iklīl*, Vol. 6, p. 314.
[159] See, for example, al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, Vol. 6, p. 314; al-Dardīr, *Al-Sharḥ al-Kabīr*, Vol. 4, p. 348; ʿAllīsh, *Minaḥ al-Jalīl*, Vol. 9, p. 335; Abū Zahrah, *Al-ʿUqūbah*, p. 143.
[160] See, for example, al-Qarāfī, *Al-Dhakhīrah*, Vol. 12, p. 123; al-ʿAbdarī, *Al-Tāj wa al- Iklīl*, Vol. 6, p. 314; al-Dardīr, *Al-Sharḥ al-Kabīr*, Vol. 4, pp. 348 f.; al-Disūqī, *Ḥāshiyah al-Disūqī*, Vol. 4, p. 349; ʿAllīsh, *Minaḥ al-Jalīl*, Vol. 9, pp. 338 f.; Ibn Kathīr, *Tafsīr*, Vol. 2, p. 51; ʿAwdah, *Al-Tashrīʿ al-Jināʾī al-Islāmī*, Vol. 2, p. 641. See also from the Shāfiʿī school, al-Ramlī, *Nihāyah al-Muḥtāj*, Vol. 8, p. 4.

helpless as a central element in this crime. A corollary of this element is the spreading of terror (*irhāb, ikhāfah*) among the victims. Unlike the rest of the jurists of the four schools, Abū Ḥanīfah and a few Ḥanbalī jurists restrict the application of the law of *ḥirābah* to certain crimes committed in the desert and unpopulated areas.[161] Abū Ḥanīfah's rationale is that the victims cannot be rescued in these places,[162] whereas in cities, villages or other populated areas, they can be rescued or helped (*yalḥaquhum al-ghawth*)[163] by the police or members of the public. Accordingly, if criminals rob a victim in populated areas, they are punished as thieves, not under the law of *ḥirābah.*[164]

He also stipulates that the crime must be committed at a certain distance from populated areas in order for the criminals to be punished under the law of *ḥirābah.*[165] Using the same rationale, Sherman A. Jackson notes that Abū Ḥanīfah excludes women from being tried under the law of *ḥirābah* because they "were incapable, by their very constitution, of bringing about *widespread fear and helplessness* [emphasis added]."[166]

The remaining majority of the jurists of the four schools apply the law of *ḥirābah* to the crimes committed in both populated and unpopulated areas alike. This is simply because the Qur'ānic text addressing this law does not restrict its application to unpopulated areas and, significantly, they add that criminals who

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[161] See, for example, al-Kāsānī, *Badā'i' al-Ṣanā'i'*, Vol. 7, p. 92; al-Shāfiʿī, *Al-Umm*, Vol. 6, p. 152; Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 124; al-Zarkashī, *Sharḥ al-Zarkashī*, Vol. 3, p. 137; Ibn Mufliḥ, *Al-Mubdi'*, Vol. 9, p. 146; Ibn ʿAbd al-Wahhāb, *Mukhtaṣar al-Inṣāf*, p. 721; al-Ṭabarī, *Ikhtilāf al-Fuqahā'*, p. 251; Ibn Ḥazm, *Al-Muḥallā*, Vol. 11, p. 303; Ibn Rushd, *Bidāyah al-Mujtahid*, Vol. 2, p. 340; Mahmassani, *Al-Qānūn wa al-'Alāqāt*, p. 199; Abū Zahrah, *Al-'Uqūbah*, pp. 142-146; ʿAwdah, *Al-Tashrī' al-Jinā'ī al-Islāmī*, Vol. 2, pp. 644 f.; El-Awa, *Punishment in Islamic Law*, p. 9; Nik Wajis, "The Crime of *Ḥirāba* in Islamic Law", pp. 69 f.

[162] Al-Māwardī, *Al-Aḥkām al-Sulṭāniyyah*, p. 87; El-Awa, *Punishment in Islamic Law*, p. 9; Jackson, "Domestic Terrorism in the Islamic Legal Tradition", p. 296.

[163] Ibn Mawdūd, *Al-Ikhtiyār*, Vol. 4, p. 123; al-Rāzī, *Al-Tafsīr al-Kabīr*, Vol. 11, p. 170.

[164] See, for example, al-Rāzī, *Al-Tafsīr al-Kabīr*, Vol. 11, p. 170.

[165] Ibn Najīm, *Al-Baḥr al-Rā'iq*, Vol. 5, p. 72; Ibn Mawdūd, *Al-Ikhtiyār*, Vol. 4, p. 123; ʿAwdah, *Al-Tashrī' al-Jinā'ī al-Islāmī*, Vol. 2, p. 644.

[166] Jackson, "Domestic Terrorism in the Islamic Legal Tradition", p. 297. See also al-Sarakhsī, *Kitāb al-Mabsūt*, Vol. 9, pp. 197 f.; Abū Zahrah, *Al-'Uqūbah*, p. 149.

commit this crime in populated areas are more deserving of the severe punishment of *ḥirābah* than those who commit it in the desert. Al-Sarakhsī, al-Shāfiʿī and Ibn Taymiyyah justify this by stating that the fact that those who commit this crime in populated areas, where people feel secure since they can be helped in cases of danger, shows that they are more dangerous than those who commit it in the desert, because they dare to overtly challenge the public and the state authorities. [167] Concerning Abū Ḥanīfah's position, the Ḥanafī jurists al-Sarakhsī and Ibn Mawdūd point out that Abū Ḥanīfah restricted *ḥirābah* to unpopulated areas because during his time, people used to carry arms in populated areas for their protection, but they say that this is no longer the case,[168] so that, unlike during Abū Ḥanīfah's time, people are helpless because they do not carry arms. It is worth adding here regarding the location where *ḥirābah* is committed, that the Ḥanbalī jurists, al-Buhūtī, al-Rahaybānī and al-Baʿlī, apply the law of *ḥirābah* to such crimes committed at sea. They argue that the Qur'ānic verse addressing *ḥirābah* is general, i.e., it does not specify the place where it is committed.[169] Interestingly, this means that the current Somali pirates and armed robbers at sea off the Somali coast and in the Gulf of Aden who have been causing a serious threat to international shipping[170] can be tried under the law of *ḥirābah*.

[167] Al-Sarakhsī, *Kitāb al-Mabsūt*, Vol. 9, p. 201; al-Shāfiʿī, *Al-Umm*, Vol. 6, p. 152; al-Māwardī, *Al-Aḥkām al-Sulṭāniyyah*, p. 87; Ibn Mufliḥ, *Al-Mubdiʿ*, Vol. 9, p. 146; Aḥmad ibn ʿAbd al-Ḥalīm ibn Taymiyyah, *Al-Siyāsah al-Sharʿiyyah fī Iṣlāḥ al-Rāʿī wa al-Raʿiyyah* (N.p.: Dār al-Maʿrifah, n.d.), p. 71; Ibn ʿAbd al-Wahhāb, *Mukhtaṣar al-Inṣāf*, p. 721; Riḍā, *Tafsīr al-Manār*, Vol. 6, p. 359; ʿAwdah, *Al-Tashrīʿ al-Jināʾī al-Islāmī*, Vol. 2, p. 645; Nik Wajis, "The Crime of *Ḥirāba* in Islamic Law", p. 70.

[168] Al-Sarakhsī, *Kitāb al-Mabsūt*, Vol. 9, p. 201; al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, Vol. 7, p. 92; Ibn Mawdūd, *Al-Ikhtiyār*, Vol. 4, p. 123; Abū Zahrah, *Al-ʿUqūbah*, pp. 144 f.

[169] Manṣūr ibn Yūnus ibn Idrīs al-Buhūtī, *Sharḥ Muntahā al-Irādāt al-Musammā Daqā'iq Ulī al-Nuhā li-Sharḥ al-Muntahā*, 2nd ed. (Beirut: ʿĀlam al-Kutub, 1996),Vol. 3, p. 381; al-Buhūtī, *Kashshāf al-Qināʿ*, Vol. 6, p. 150; al-Rahaybānī, *Maṭālib*, Vol. 6, p. 251; al-Baʿlī, *Kashf al-Mukhaddarāt*, Vol. 2, p. 770.

[170] On 2 December 2008, the Security Council unanimously adopted the resolution 1846 (2008) which authorizes states and regional organization for a period of twelve months to pursue pirates and use "'all necessary means'… to fight piracy and armed robbery at sea off the Somali coast." Available

Thus, in all the jurists' elaborations and deliberations on defining the nature of *ḥirābah*, the central element in this crime is: unjustly attacking and/or spreading terror among innocent civilians who have done them no wrong and are not their enemies. The jurists express this central element by using various terms. For example, regarding the context of *ḥirābah*, the jurists explain that the criminals attack their victims *mujāharah* (overtly, publicly, openly) and *mukābarah*/*mughālabah* (forcefully) in a context in which the victims *lā yalḥaquhum al-ghawth* (cannot be rescued). Regarding the motives behind *ḥirābah*, the jurists indicate that the *akhdh al-māl* (taking money) or *ikhāfah*/*irhāb* (intimidation, terrorism) are the main objectives of this crime. In conclusion, the classical Muslim jurists' definitions of *ḥirābah* coincide in certain respects with the most salient elements of the current phenomenon of terrorism, particularly domestic terrorism, as shown below.

#### 5.2.2.1 Modern Forms of *Ḥirābah*

The *ḥirābah* verse describes the acts of this crime as (1) making war upon God and His Messenger and (2) striving to make *fasād* (destruction, damage) in the land. The "making of war upon God and his Messenger" is understood by the jurists to mean, as explained in the definitions of *ḥirābah* above and in its punishments discussed below, killing and/or cutting off limbs of innocent civilians in the specific contexts described above – armed robbery on land for most jurists and also at sea for some Ḥanbalīs – or spreading terror among civilians. Interestingly, al-Qurṭubī (d. 671/1272) explains that the Qur'ān metaphorically refers to *ḥirābah* as a war against God and His Messenger as an indication of the enormity of harming people in the

from http://www.un.org/News/Press/docs//2008/sc9514.doc.htm; Internet; accessed on 26 March 2009.

sight of God. Similarly, he adds, the Qur'ān also metaphorically refers to charity given to the poor as given to God (Qur'ān 2:245),[171] as an indication of the great reward God gives to those who help the poor. The Malaysian researcher Nik Rahim Nik Wajis points out in his PhD thesis "The Crime of *Ḥirāba* in Islamic Law", that the classical "jurists seem to ignore the most important element of *ḥirāba*, i.e., causing destruction (*fasād*), in their definitions."[172] In fact, the concept of *fasād* in the *ḥirābah* verse, as the exegetes commonly agree, is the description[173] of the nature of the crimes treated under the law of *ḥirābah* – such as terrorising the street, armed robbery, killing, *zinā*[174] (rape) and destruction[175] – and the effects they have on the victims and society as a whole. Significantly, al-Ṭabarī and al-Suyūṭī used the Qur'ānic metaphorical expression *yuhlik al-ḥarth wa al-nasl*[176] (destroy crops and progeny) to refer to the sort of wanton destruction the crime of *ḥirābah* inflicts on human lives and property.[177] Obviously, the sort of primitive, wanton destruction depicted in the writings of the classical Muslim jurists is unimaginably limited compared with the degree of wanton and indiscriminate destruction modern weaponry can inflict on the human lives and property.

Since the forms of *fasād*, destruction of the human lives and property, change with time and place,[178] certain scholars explicitly argue for including specific crimes

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[171] Al-Qurṭubī, *Al-Jāmiʿ*, Vol. 6, p. 150. See also al-Rāzī, *Al-Tafsīr al-Kabīr*, Vol. 11, p. 169; Abū Zahrah, *Al-ʿUqūbah*, pp. 140 f.
[172] Nik Wajis, "The Crime of *Ḥirāba* in Islamic Law", p. 66. It is worth noting that Nik Wajis translates the concept *fasād* here "causing destruction", although he used the word "mischief" in translating the same concept in the *ḥirābah* verse.
[173] Riḍā, *Tafsīr al-Manār*, Vol. 6, pp. 357 f.
[174] Obviously exegetes and jurists mean by the crime of *Zinā* here in the context of *ḥirābah* rape and not fornication/adultery. In this context, when he was a judge, Ibn al-ʿArabī relates that he inflicted the *ḥirābah* punishment on highway robbers who snatched and raped a woman from her husband and the others accompanying them. See Abū Zahrah, *Al-ʿUqūbah*, pp. 154 f.
[175] See, for example, al-Ṭabarī, *Jāmiʿ al-Bayān*, Vol. 6, p. 211; al-Suyūṭī, *Al-Durr al-Manthūr*, Vol. 2, p. 70; al-Samarqandī, *Baḥr al-ʿUlūm*, Vol. 1, p. 410; Riḍā, *Tafsīr al-Manār*, Vol. 6, pp. 356, 359.
[176] Qur'ān 2:245.
[177] Al-Ṭabarī, *Jāmiʿ al-Bayān*, Vol. 6, p. 211; al-Suyūṭī, *Al-Durr al-Manthūr*, Vol. 2, p. 70. See also Riḍā, *Tafsīr al-Manār*, Vol. 6, pp. 356 f., 359.
[178] See Riḍā, *Tafsīr al-Manār*, Vol. 6, p. 362.

under the law of *ḥirābah*. For example, Rashīd Riḍā (d. 1354/1935) adds "rape or abduction for the purposes of obtaining a ransom",[179] while Shaykh Abū Zahrah (1898-1974) adds: assassination of politicians and businessmen, robbery and sabotage committed by clandestine organizations such as mafia gangs (*ʿiṣābāt al-liṣūṣ*) and terrorist organizations in America and Europe.[180] Nik Wajis (b. 1963) adds terrorism and drug trafficking.[181] Furthermore, ʿAbd al-ʿAzīz ibn ʿAbd Allah ibn Muḥammad Āl al-Shaykh (b. 1943), the current Grand Muftī of the Kingdom of Saudi Arabia and head of the Committee of Senior Scholars and the Department of Scholarly Research and *Fatwa* in Saudi Arabia,[182] includes among the crimes to be punished under the law of *ḥirābah*: "[terrorist] explosions and hijacking airplanes, ships, trains, etc."[183] The Islamic Fiqh Council[184] Statement on Terrorism, signed by a group of world-renowned Muslim scholars, adds that "the perpetrators of, and accomplices who plan, finance, supply weapons for, or propagate, such terrorist acts receive the deterrent punishments prescribed in the *ḥirābah* verse (Qur'ān 5:33)."[185] In response to the statements of these scholars, indeed, rape, robbery and certain forms of terrorism are already treated under the law of *ḥirābah* by the classical jurists, as shown above. But arguably the crimes of abduction for ransom, organized assassinations and drug trafficking could reasonably be treated under the law of *ḥirābah* on the grounds that abduction for ransom causes at least intimidation and terror to the victims and their families, while organized assassinations and drug trafficking inflict damage on the lives of individuals and society as a whole.

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[179] Abou El Fadl, *Rebellion and Violence*, p. 337.
[180] Abū Zahrah, *Al-ʿUqūbah*, pp. 147 f.
[181] Nik Wajis, "The Crime of *Ḥirāba* in Islamic Law", p. 225.
[182] Āl al-Shaykh is appointed in these positions on Saturday 15-5-1999/29-1-1420.
[183] ʿAbd al-ʿAzīz ibn ʿAbd Allah ibn Muḥammad Āl al-Shaykh, "Al-Irhāb: Asbābuh wa Wasā'il al-ʿIlāj", *The Islamic Fiqh Council Journal*, Issue No. 17, 2004/1425, pp. 38 f.
[184] The Islamic Fiqh Council is affiliated to the Muslim World League and is based in Mecca.
[185] The Islamic Fiqh Council, "Bayān Makkah al-Mukarramah bi-Sha'n al-Irhāb wa Qarārāt al-Dawrah al-Sābiʿah ʿAsharah", *The Islamic Fiqh Council Journal*, Issue No. 17, 2004/1425, p. 276.

Abou El Fadl (b. 1963) argues that, theoretically, the concept of *fasād* "could be applied to a wide range of activities including anything from writing heretical poetry to raping and pillaging."[186] However, leaving theory aside and addressing the crime of *ḥirābah*, he recognizes – as did Abū Zahrah several decades before him – that "the Qur'ān limits corruption on the earth [*fasād*] to the *destruction* [emphasis added here and below] of property, such as crops or, perhaps, the economic system, and the *destruction* of lives".[187] That is to conclude that the particular concept of *fasād* as a description, and an element, of the crime of *ḥirābah* is confused to a certain extent by the use of the same term, *fasād*, to mean "corruption" in the sense of political corruption, economic corruption, etc. This confusion may be the reason for Frank E. Vogel's unwarranted distinction between *ḥirābah* and *fasād* in the earth as two different crimes.[188] Referring to *fatwa* number 148 issued on 24-8-1988/12-1-1409 by the Committee of Senior Saudi Scholars,[189] Vogel states: "Interestingly, it is this crime of 'corruption,' [*fasād*] and not *hiraba*, that is used in present-day Saudi Arabia to punish domestic terrorism."[190] In fact, this *fatwa* does not make this distinction. It advocates that the perpetrators of terrorist acts such as killing, sabotage and hijacking airplanes deserve the death penalty because these terrorist acts constitute *fasād* in the earth and that the danger of such terrorists is greater than that of highway robbers.[191]

Thus, identifying the crimes that constitute the particular *fasād* intended in the Qur'ānic and juristic treatment of the law of *ḥirābah* is important because this

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[186] Abou El Fadl, *Rebellion and Violence*, p. 48.
[187] Ibid., footnote no. 69. See also Abū Zahrah, *Al-ʿUqūbah*, p. 153.
[188] Vogel, *Islamic Law and Legal System*, p. 251.
[189] See Aḥmad ibn Sālim al-Miṣrī, ed., *Fatāwā al-ʿUlamā' al-Kibār fī al-Irhāb wa al-Tadmīr wa Ḍawābiṭ al-Jihād wa al-Takfīr wa Muʿāmalah al-Kuffār* (Riyadh: Dār al-Kayān, 2005), pp. 77-79.
[190] Vogel, "The Trial of Terrorists under Classical Islamic Law", p. 60. See also Vogel, *Islamic Law and Legal System*, pp. 271 f. On the execution of *ḥirābah* punishments in some cases in Saudi Arabia from 16 May 1981 to 18 April 1992, see Vogel, *Islamic Law and Legal System*, pp. 259-278.
[191] Al-Miṣrī, ed., *Fatāwā al-ʿUlamā' al-Kibār fī al-Irhāb*, pp. 77-79; Vogel, *Islamic Law and Legal System*, p. 271.

avoids any unwarranted inclusion of other crimes under this law. In other words, confusing acts of *fasād* (destruction) committed in the particular context of *ḥirābah* with other acts of destruction committed in different contexts, such as during a rebellion, is a major error because the acts of destruction in these two contexts are treated under two different laws. This element of causing destruction associated with the crime of *ḥirābah* might be one of the reasons for the confusion between *ḥirābah* and rebellion because destruction of lives and property takes place in both cases. Furthermore, it is interesting to add here that Ḥusayn Ḥāmid Hassān (b. 1932), former professor of Islamic Law at Cairo University, argued that force should be used to liberate Kuwait from the Iraqi invasion because this invasion is classified in Islam as an act of *baghy* (war between Muslim groups or states) *or*, strangely enough, *ḥirābah*.[192] It is unclear why Hassān wants to apply the punishments of highway robbery to the Iraqi regime here, but what is more perplexing is that he classifies this invasion as both *baghy* and *ḥirābah* at the same time.[193] This confirms that there is a certain degree of confusion in the writings of some scholars between the laws of rebellion and highway robbery.

#### 5.2.2.2 Rules of Fighting against *al-Muḥāribūn*

A few jurists enumerate five differences between the rules of fighting against *muḥāribūn* and those for fighting against rebels. First, concerning the rules of engagement, the state army soldiers may deliberately attempt to kill the *muḥāribūn* during combat, but they cannot deliberately attempt to kill rebels during combat because the objective of fighting against rebels is merely to bring them under obedience to the ruler, as shown above. Second, *muḥāribūn* can be pursued and

[192] Hassān, "Ḥukm al-Sharīʿah fī Ghazw al-Irāq lilkuwayt", p. 193.
[193] Ibid.

targeted if they escape during combat. They must be killed or captured because, third, unlike rebels, they are liable for the damage they inflict on the lives and property during combat. Fourth, captured *muḥāribūn* may be imprisoned, while rebels are to be set free after the cessation of fighting, as shown above. Fifth, any taxes collected by *muḥāribūn* from the public will be re-collected, unlike taxes collected by rebels.[194] These stark differences illuminate the fact that *muḥāribūn* are treated under Islamic law as pure criminals in contrast to rebels, who are treated as just warriors.

Strangely enough, concerning the rules for fighting against *muḥāribūn*, Majid Khadduri claims that the head of state "has the choice of treating them on the same footing as the bughāt (singular, bagh[y]) or being more lenient to them, depending on the degree of the seriousness of their conduct." [195] In fact, the two sources upon which Khadduri bases this observation, namely al-Māwardī and Ḥammīdullāh,[196] list the five differences mentioned above, which clearly indicate, contrary to what Khadduri claims, harsher rules of engagement with, and treatment of, *muḥāribūn*. In addition, unlike enemy combatants who are unbelievers (*al-kāfir al-muḥārib*), or obviously any other enemy combatants, *muḥāribūn* cannot be given quarter even if they ask for it,[197] because they must either surrender to the state authorities or be captured or killed in combat. Moreover, Khadduri also seems to confuse rebels with *muḥāribūn* somewhat. In his extremely brief treatment of these two kinds of internal hostilities, he refers to fighting against rebels as jihād against dissension/dissenters[198] and fighting against *muḥāribūn* once as jihād against secession and once as jihād

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[194] See Al-Qarāfī, *Al-Dhakhīrah*, Vol. 12, p. 9; al-Māwardī, *Al-Aḥkām al-Sulṭāniyyah*, p. 86; al-ʿAbdarī, *Al-Tāj wa al- Iklīl*, Vol. 6, p. 278; Ḥammīdullāh, *Muslim Conduct of State*, p. 189.
[195] Khadduri, *War and Peace*, p. 80.
[196] Al-Māwardī, *Al-Aḥkām al-Sulṭāniyyah*, p. 86; Ḥammīdullāh, *Muslim Conduct of State*, p. 188.
[197] Al-Ṣāwī, *Bulghah al-Sālik*, Vol. 4, p. 263; ʿAllīsh, *Minaḥ al-Jalīl*, Vol. 9, p. 348.
[198] Khadduri, *War and Peace*, pp. 74, 77-79.

against deserters and highway robbers.[199] Aside from the fact that Khadduri basically restricts the meaning of *baghy* to secession rather stating that it also means the violent overthrow of a ruling regime and warring between Muslims, the *muḥāribūn* are certainly not secessionists, but pure criminals or – as he says – "highway robbers".[200] Moreover, it is not clear what he means by labelling them "deserters".

**5.2.2.3 Punishment of *Ḥirābah***

In addition to "a grave chastisement" in the Hereafter, the *ḥirābah* verse prescribes four specific punishments for *muḥāribūn* in this world: execution, *ṣalb* (gibbeting), amputation of a hand and a foot from opposite sides, or *nafy* (banishment/imprisonment). Thus, the punishment for *ḥirābah* is classified as a *ḥudūd* punishment because it is mentioned in the Qur'ān.[201] However, this does not preclude the usual disagreements among the jurists. The jurists' interpretations of these Qur'ān-prescribed punishments produced two sets of disagreements among the jurists: the first set of disagreements concerns the intended meaning and application of these punishments, particularly *ṣalb* and *nafy*. The second set of disagreements concerns the implementation of these four punishments, i.e., the acts for which, or the criminals for whom, each of these punishments is prescribed.

On the first set of disagreements, concerning *ṣalb*, Ibn Taymiyyah explains that it means placing the criminals on a high place so that people can see them and, thus, know about the crimes they have committed.[202] Abou El Fadl states that "crucifixion [the usual translation for *ṣalb*] meant the hanging or tying of a person or corpse to the bark of a tree. It did not mean nailing or placing someone on a

[199] Ibid., pp. 74, 79.
[200] Ibid., p. 79.
[201] See El-Awa, *Punishment in Islamic Law*, p. 8.
[202] Ibn Taymiyyah, *Al-Siyāsah al-Shar'iyyah*, p. 70.

cross."[203] That is to emphasize here, as Abou El Fadl attempts to show and as explained below, that the meaning of *ṣalb*, as a punishment used in Islamic law exclusively for the crime of *ḥirābah*, does not carry the same meaning associated with *ṣalb al-Masīḥ* (crucifixion of Christ). This is why the word gibbeting is used here in the sense of "displaying the criminals convicted of *ḥirābah* tied on a high place before or after execution for a period of time" as a translation for *ṣalb* instead of its usual translation as "crucifixion" to avoid any confusion of these two different meanings.

Significantly, the objective of gibbeting criminals, as indicated by the jurists, is to publicize their actions and the punishments they receive in order to deter other criminals.[204] However, typically, the jurists disagree on the duration of gibbeting and whether criminals should be gibbeted before or after execution. The Ḥanafīs, Shāfiʿīs and Mālikīs hold that criminals should be gibbeted for three days, while the Ḥanbalīs argue that criminals should be gibbeted until the objective of gibbeting is achieved, without determining any duration.[205] Moreover, al-Shāfiʿī and the majority of the Ḥanbalīs jurists maintain that the criminal should be gibbeted after execution because this is the order given in the *ḥirābah* verse and gibbeting – keeping the criminal tied to a tree or a *khashabah* (a piece of wood) for the duration/s mentioned above before execution – is a sort of torture, which is prohibited by the Prophet. In addition, al-Shāfiʿī, al-Ṭaḥāwī and Ibn Qudāmah also reject gibbeting before execution because

[203] Abou El Fadl, *Rebellion and Violence*, p. 56, footnote no. 103.
[204] See, for example, al-Zarkashī, *Sharḥ al-Zarkashī*, Vol. 3, p. 139; al-Mirdāwī, *Al-Inṣāf*, Vol. 10, p. 298; Ibn Taymiyyah, *Al-Siyāsah al-Sharʿiyyah*, p. 70; Ibn Qudāmah, *Al-Mughnī*, Vol. 9, pp. 126 f.; Riḍā, *Tafsīr al-Manār*, Vol. 6, p. 360; al-Ḥaqīl, *Haqīqah Mawqif al-Islām*, pp. 147 f.
[205] See, for example, al-Māwardī, *Al-Aḥkām al-Sulṭāniyyah*, p. 86; al-Qarāfī, *Al-Dhakhīrah*, Vol. 12, p. 130; al-Mirdāwī, *Al-Inṣāf*, Vol. 10, p. 293; Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 127; Ibn Qudāmah, *ʿUmdah al-Fiqh*, p. 149; Ibn Mufliḥ, *Al-Furūʿ*, Vol. 6, p. 138; Ibn Rushd, *Bidāyah al-Mujtahid*, Vol. 2, p. 341; Riḍā, *Tafsīr al-Manār*, Vol. 6, p. 360; ʿAwdah, *Al-Tashrīʿ al-Jināʾī al-Islāmī*, Vol. 2, p. 654.

this is similar to mutilation, which is also prohibited by the Prophet.[206] However, al-Awzāʿī (d. 157/774), the majority of the Ḥanafīs and the Mālikīs maintain that the criminal is to be gibbeted before execution because gibbeting is a punishment and only living human beings are to be punished, not the deceased.[207] It is worth mentioning here that the Mālikīs advocate that adding gibbeting to execution is left to the discretion of the ruler since execution alone is sufficient, if the ruler so chooses.[208]

Regarding the meaning of *nafy* as a punishment for *ḥirābah*, the jurists give a host of different meanings for it: (1) for Anas ibn Mālik and al-Ḥasan al-Baṣrī (d. 110/728), it means that the criminals must be exiled from *dār al-Islām*; (2) while for ʿUmar ibn ʿAbd al-ʿAzīz (d. 101/720) and Saʿīd ibn Jubayr (d. 95/714) it means sending the criminals into exile to a different town within *dār al-Islām*; (3) the Ḥanafīs and Shāfiʿīs maintain that it means imprisonment until the criminals repent, without determining the period of imprisonment, though some argue for a period of a year; (4) for the Mālikīs it means both imprisonment and exile until repentance; (5) the Ḥanbalīs, strangely enough, hold that it means that the criminals should be kept incessantly in exile, i.e., without letting them settle in any place until they repent because they may return to highway robbery if they settle anywhere and (6) it is even reported that some literally understand *nafy* (from the land) to mean execution.[209]

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[206] Al-Shāfiʿī, *Al-Umm*, Vol. 6, p. 152; al-Sarakhsī, *Kitāb al-Mabsūt*, Vol. 9, p. 196; al-Buhūtī, *Kashshāf al-Qināʿ*, Vol. 6, p. 150; Ibn Qudāmah, *Al-Mughnī*, Vol. 9, pp. 126 f.; Muḥammad ibn ʿAlī ibn Muḥammad al-Shawkānī, *Nayl al-Awṭār: Min Aḥādīth Sayyid al-Khyār Sharḥ Muntaqā al-Akhbār* (Beirut: Dār al-Jīl, 1973), Vol. 7, p. 337; ʿAwdah, *Al-Tashrīʿ al-Jināʾī al-Islāmī*, Vol. 2, pp. 653 f.

[207] Al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, Vol. 7, p. 95; al-Sarakhsī, *Kitāb al-Mabsūt*, Vol. 9, p. 196; Ibn Mawdūd, *Al-Ikhtiyār*, Vol. 5, p. 74; al-Māwardī, *Al-Aḥkām al-Sulṭāniyyah*, p. 86; al-Qarāfī, *Al-Dhakhīrah*, Vol. 12, p. 130; al-Dardīr, *Al-Sharḥ al-Kabīr*, Vol. 4, p. 349; al-Disūqī, *Ḥāshiyah al-Disūqī*, Vol. 4, p. 349; ʿAllīsh, *Minaḥ al-Jalīl*, Vol. 9, p. 341; Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 126; al-Ṭabarī, *Ikhtilāf al-Fuqahāʾ*, pp. 255 f.; Ibn Rushd, *Bidāyah al-Mujtahid*, Vol. 2, p. 341; ʿAwdah, *Al-Tashrīʿ al-Jināʾī al-Islāmī*, Vol. 2, pp. 653 f.

[208] Al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, Vol. 6, p. 315; al-Dardīr, *Al-Sharḥ al-Kabīr*, Vol. 4, p. 349.

[209] On the meaning of *nafī* as a punishment for the crime of *ḥirābah* see, for example, al-Sarakhsī, *Kitāb al-Mabsūt*, Vol. 9, pp. 135, 199; al-Samarqandī, *Tuḥfah al-Fuqahāʾ*, Vol. 3, p. 156; al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, Vol. 7, p. 95; Ibn Mawdūd, *Al-Ikhtiyār*, Vol. 4, p. 121; ʿUthmān ibn ʿAlī al-

Interestingly, the second set of disagreements is over interpretations of the meaning of the Arabic preposition *aw* (or) separating each of these punishments. In fact, this preposition caused a major division among the jurists into two groups. The first, the majority of the jurists, including the Ḥanafīs, Shāfiʿīs and Ḥanbalīs, maintain that "or" in this verse indicates a certain sort of *tartīb* (order) for these punishments in accordance with the crimes committed. Thus, in their view, first, if a criminal kills and robs his victim – the jurists of all schools are unanimous here – he must be executed. In addition, Shāfiʿīs and Ḥanbalīs add that the criminal must be gibbeted, while according to some Ḥanafīs the judge has the right to decide whether to add gibbeting and/or amputation of the right hand and left foot. Second, if a criminal only kills his victim without robbing him, he must only be executed. Third, if a criminal only robs his victim, his right hand and left foot must be amputated. It is worth adding here that the Ḥanafīs, Shāfiʿīs and Ḥanbalīs, though not the Mālikīs,[210] stipulate that the property taken must exceed the *niṣāb* (value) of one *dinār*/ten dirhams for the Ḥanafīs,[211] or ¼ *dinār* for the majority,[212] the equivalent of about $16.94 according to Jackson's calculations.[213] Significantly, although the same value is stipulated for the punishment of the crime of theft, the punishment for theft is the

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Zaylaʿī, *Tabīīn al-Ḥaqā'q: Sharḥ Kanz al-Daqā'q* (Cairo: Dār al-Kutub al-Islāmī, 1895-6/1313), Vol. 4, p. 179; Ibn Najīm, *Al-Baḥr al-Rā'iq*, Vol. 5, p. 73, Vol. 6, 307; al-Ramlī, *Nihāyah al-Muḥtāj*, Vol. 8, p. 5; ʿAbd Allah ibn Abī Zayd al-Qayrawānī, *Risālah Ibn Abī Zayd al-Qayrawānī* (Beirut: Dār al-Fikr, n.d.), p. 127; ʿAllīsh, *Minaḥ al-Jalīl*, Vol. 9, p. 341; al-Māwardī, *Al-Ḥāwī*, Vol. 13, pp. 355 f.; Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 129; al-Zarkashī, *Sharḥ al-Zarkashī*, Vol. 3, p. 140; al-Buhūtī, *Kashshāf al-Qināʿ*, Vol. 6, p. 153; al-Mirdāwī, *Al-Inṣāf*, Vol. 10, pp. 298 f.; al-Rahaybānī, *Maṭālib*, Vol. 6, p. 255; Ibn Mufliḥ, *Al-Mubdiʿ*, Vol. 9, p. 151; Ibn ʿAbd al-Wahhāb, *Mukhtaṣar al-Inṣāf*, pp. 721 f.; al-Baʿlī, *Kashf al-Mukhaddarāt*, Vol. 2, p. 772; al-Ṭabarī, *Ikhtilāf al-Fuqahā'*, p. 255; al-Māwardī, *Al-Aḥkām al-Sulṭāniyyah*, p. 85; Ibn Rushd, *Bidāyah al-Mujtahid*, Vol. 2, p. 341; al-Rāzī, *Al-Tafsīr al-Kabīr*, Vol. 11, p. 171; Riḍā, *Tafsīr al-Manār*, Vol. 6, p. 361; Abū Zahrah, *Al-ʿUqūbah*, pp. 157-159; ʿAwdah, *Al-Tashrīʿ al-Jinā'ī al-Islāmī*, Vol. 2, pp. 648 f.; Mahmassani, *Al-Qānūn wa al-ʿAlāqāt*, p. 200; Khadduri, *War and Peace*, pp. 79 f.; El-Awa, *Punishment in Islamic Law*, p. 12.

[210] ʿAllīsh, *Minaḥ al-Jalīl*, Vol. 9, p. 340. See also Abū Zahrah, *Al-ʿUqūbah*, p. 156.

[211] Al-Sarakhsī, *Kitāb al-Mabsūt*, Vol. 9, p. 200; Abū Zahrah, *Al-ʿUqūbah*, pp. 133, 156.

[212] Al-Shāfiʿī, *Al-Umm*, Vol. 6, p. 152; al-Shirbīnī, *Mughnī al-Muḥtāj*, Vol. 4, p. 181; al-Ghazālī, *Al-Waṣīt*, Vol. 6, p. 495; Ibn Qudāmah, *Al-Mughnī*, Vol. 9, pp. 128 f.; al-Buhūtī, *Kashshāf al-Qināʿ*, Vol. 6, p. 152; Ibn Ḥanbal, *Masā'il*, 429; al-Ṭabarī, *Ikhtilāf al-Fuqahā'*, p. 247; Abū Zahrah, *Al-ʿUqūbah*, pp. 133, 156; ʿAwdah, *Al-Tashrīʿ al-Jinā'ī al-Islāmī*, Vol. 2, p. 643; Jackson, "Domestic Terrorism in the Islamic Legal Tradition", p. 301.

[213] Jackson, "Domestic Terrorism in the Islamic Legal Tradition", p. 301.

amputation of the thief's right hand, while the punishment for taking the same amount in a robbery is the amputation of both the right hand and the left foot. In other words, the punishment is doubled here because of the elements associated with the crime of *ḥirābah*, most notably al-Sarakhsī mentions, *mujāharah*.[214] Furthermore, if a group of criminals rob their victim, Abū Ḥanīfah and al-Shāfiʿī stipulate that each criminal's share of the stolen property must exceed this specified value, though for Ibn Ḥanbal it is suffice to amputate the right hand and left foot of all the criminals if the taken property exceeds this value.[215] Fourth, if a criminal neither kills nor robs but merely terrorizes the victim, he must be exiled/imprisoned.[216] The majority of the jurists in this group depend for this particular order of punishments on a report attributed to Ibn ʿAbbās (d. 68/668) that supports it,[217] although few hold that Angel Gabriel told the Prophet about this order.[218]

The second group, the Mālikīs and the jurists of the extinct Ẓāhirī school in addition to al-Ḥasan al-Baṣrī, ʿAṭā' and Mujāhid, maintain that "or" in the *ḥirābah* verse indicates a sort of *takhyīr*, i.e., giving the judge the option of sentencing

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214 Al-Sarakhsī, *Kitāb al-Mabsūt*, Vol. 9, p. 195; Abū Zahrah, *Al-ʿUqūbah*, p. 157.

215 Al-Sarakhsī, *Kitāb al-Mabsūt*, Vol. 9, p. 200; Abū Zahrah, *Al-ʿUqūbah*, p. 157; ʿAwdah, *Al-Tashrīʿ al-Jinā'ī al-Islāmī*, Vol. 2, p. 643.

216 On the first trend see, for example, al-Sarakhsī, *Kitāb al-Mabsūt*, Vol. 9, p. 195; Ibn Mawdūd, *Al-Ikhtiyār*, Vol. 4, pp. 121 f.; Ibn Najīm, *Al-Baḥr al-Rā'iq*, Vol. 5, p. 73; al-Shāfiʿī, *Al-Umm*, Vol. 6, pp. 151 f.; al-Ghazālī, *Al-Wajīz*, Vol. 2, p. 177; al-Ghazālī, *Al-Waṣīt*, Vol. 6, pp. 491, 495-497; al-Shirbīnī, *Mughnī al-Muḥtāj*, Vol. 4, pp. 181-183; al-Māwardī, *Al-Aḥkām al-Sulṭāniyyah*, pp. 84 f.; Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 125; Ibn Qudāmah, *ʿUmdah al-Fiqh*, p. 149; al-Zarkashī, *Sharḥ al-Zarkashī*, Vol. 3, pp. 137 f.; al-Mirdāwī, *Al-Inṣāf*, Vol. 10, pp. 296-298; al-Buhūtī, *Al-Rawḍ al-Murbiʿ*, Vol. 3, pp. 330 f.; al-Buhūtī, *Kashshāf al-Qināʿ*, Vol. 6, pp. 150, 153; Ibn Mufliḥ, *Al-Furūʿ*, Vol. 6, pp. 137 f.; al-Rahaybānī, *Maṭālib*, Vol. 6, p. 254; ʿAbd Allah ibn Aḥmad ibn Ḥanbal, *Masā'il al-Imām Aḥmad Ibn Ḥanbal Riwāyah Ibnih ʿAbd Allah*, ed. Zuhayr al-Shāwīsh (Beirut: Al-Maktab al-Islāmī, 1981/1401), p. 429; Ibn Taymiyyah, *Al-Siyāsah al-Sharʿiyyah*, pp. 66 f.; Ibn Rushd, *Bidāyah al-Mujtahid*, Vol. 2, p. 341; al-Rāzī, *Al-Tafsīr al-Kabīr*, Vol. 11, p. 170; Abū Zahrah, *Al-ʿUqūbah*, pp. 151-154; ʿAwdah, *Al-Tashrīʿ al-Jinā'ī al-Islāmī*, Vol. 2, pp. 647-653; Mahmassani, *Al-Qānūn wa al-ʿAlāqāt*, pp. 199 f.; al-Ḥaqīl, *Haqīqah Mawqif al-Islām*, 147; Malekian, *The Concept of Islamic International Criminal Law*, p. 134; Abou El Fadl, *Rebellion and Violence*, pp. 56 f.; Vogel, "The Trial of Terrorists under Classical Islamic Law", p. 59.

217 Al-Sarakhsī, *Kitāb al-Mabsūt*, Vol. 9, p. 195; al-Buhūtī, *Al-Rawḍ al-Murbiʿ*, Vol. 3, p. 331; al-Buhūtī, *Kashshāf al-Qināʿ*, Vol. 6, p. 150; al-Rāzī, *Al-Tafsīr al-Kabīr*, Vol. 11, p. 170; Abū Zahrah, *Al-ʿUqūbah*, p. 151; al-Ḥaqīl, *Haqīqah Mawqif al-Islām*, 147.

218 Al-Māwardī, *Naṣīḥah al-Mulūk*, p. 256; Abū Zahrah, *Al-ʿUqūbah*, p. 153.

criminals to any of the four prescribed punishments, except in cases where they have killed their victims. As referred to above, in cases of murder, the criminal must be executed and gibbeting can be added if the judge so chooses. In any other cases, which do not involve killing, the judge has the authority to choose any of the four punishments prescribed in the *ḥirābah* verse. But in his choice of punishments, the judge should use his discretion to act in the interest of society by choosing the punishment that may stop each criminal from committing *ḥirābah* again. Hence, the Mālikīs explain that, if the criminal is skilled at planning the crime, he is to be executed because amputation of his right hand and left foot would not prevent the harm he could do, i.e., his ability to plan crimes again, while if the criminal has the physical strength to carry out the crime but not the intellectual ability to plan it, then his right hand and left foot are to be amputated because this will prevent him from offending again. By the same logic, if the criminal neither has the intellectual ability to plan the crime nor the physical strength to carry it out, then he is to be exiled or given a discretionary punishment.[219] Thus, according to the second group, the punishment for *ḥirābah* must be decided according to the intellectual and physical abilities of the criminal, and not according to the crimes he committed as maintained by the first group of jurists.

One of the most important questions concerning the crime of *ḥirābah* is whether or not the Islamic state has the jurisdiction to inflict the punishment for *ḥirābah* if it is committed by Muslim criminals outside the territories of the Islamic

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[219] On the second trend see, for example, al-Qayrawānī, *Risālah*, p. 127; Ibn ʿAbd al-Barr, *Al-Kāfī fī Fiqh Ahl al-Madīnah*, pp. 222 f.; al-Qarāfī, *Al-Dhakhīrah*, Vol. 12, p. 126; Ibn Rushd, *Bidāyah al-Mujtahid*, Vol. 2, p. 341; al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, Vol. 6, p. 315; al-Dardīr, *Al-Sharḥ al-Kabīr*, Vol. 4, pp. 349 f.; al-Disūqī, *Ḥāshiyah al-Disūqī*, Vol. 4, pp. 349 f.; ʿAllīsh, *Minaḥ al-Jalīl*, Vol. 9, pp. 341-344; al-Māwardī, *Al-Ḥāwī*, Vol. 13, p. 353; al-Māwardī, *Al-Aḥkām al-Sulṭāniyyah*, p. 84; Ibn Taymiyyah, *Al-Siyāsah al-Sharʿiyyah*, p. 67; Abū Zahrah, *Al-ʿUqūbah*, pp. 154-157; Mahmassani, *Al-Qānūn wa al-ʿAlāqāt*, p. 200; ʿAwdah, *Al-Tashrīʿ al-Jināʾī al-Islāmī*, Vol. 2, p. 647; El-Awa, *Punishment in Islamic Law*, p. 11; Jackson, "Domestic Terrorism in the Islamic Legal Tradition", p. 300; Vogel, "The Trial of Terrorists under Classical Islamic Law", p. 59.

state. In accordance with the two conflicting positions of the Muslim jurists on the issue of the jurisdiction of the Islamic state over crimes committed by Muslims outside its territories, on the one hand, the Ḥanafīs restrict the punishment for *ḥirābah* to crimes committed by Muslims or *dhimmis* (permanent non-Muslim citizens of the Islamic state) inside the territories of the Islamic state. But they disagree on the application of the punishment if the crime is committed inside the Islamic state by temporary non-Muslim residents, *musta'mins*. The Ḥanafīs also stipulate that the victims must be Muslims or *dhimmis*, because the possessions of an enemy belligerent who is given temporary quarter or safe conduct (*al-ḥarbī al-musta'min*) are not permanently inviolable. Moreover, if the crime is committed outside the Islamic state or even inside a territory controlled by Muslim separatists (*bughāh*), the head of the Islamic state has no authority to inflict the *ḥirābah* punishment on the criminals if the case is brought to him, because the crime occurred outside the control, and therefore the jurisdiction, of the Islamic state. But Muslim separatists certainly have the authority to apply the punishment for the crime of *ḥirābah* if it occurs inside the territories under their control.[220] On the other hand, the Shāfiʿīs, Mālikīs, Ḥanbalīs and Ẓāhirīs maintain that the punishment for *ḥirābah* must be inflicted whenever the criminals are Muslims or *dhimmis* and the victims are Muslims or *dhimmis*, even if the crime occurs outside the territories of the Islamic state.[221]

Thus, to partially answer Vogel' question: "What would be the course of events if alleged perpetrators of the September 11 terrorist attacks were tried before a

[220] See Al-Sarakhsī, *Kitāb al-Mabsūt*, Vol. 9, pp. 195, 203 f.; al-Kāsānī, *Badā'iʿ al-Ṣanā'iʿ*, Vol. 7, pp. 91 f.; Riḍā, *Tafsīr al-Manār*, Vol. 6, p. 358; ʿAwdah, *Al-Tashrīʿ al-Jinā'ī al-Islāmī*, Vol. 2, p. 644; Nik Wajis, "The Crime of *Ḥirāba* in Islamic Law", pp. 80, 167; Ḥammīdullāh, *Muslim Conduct of State*, p. 188. It is worth pointing out that Ḥammīdullāh refers here only to this Ḥanafī position as if this were the general Islamic position, and therefore he ignores the majority's position, because he depends only on two Ḥanafī sources, mainly al-Sarakhsī and al-Shaybānī.

[221] ʿAwdah, *Al-Tashrīʿ al-Jinā'ī al-Islāmī*, Vol. 2, p. 644; Nik Wajis, "The Crime of *Ḥirāba* in Islamic Law", pp. 80, 167.

court that applied solely classical Islamic law?”,[222] – assuming the perpetrators were still alive, it depends first on which school of Islamic law such a court applies. According to the above two positions on the jurisdiction of Islamic law over crimes committed outside the Islamic state, these criminals, or any Muslim perpetrators of acts of *ḥirābah* committed outside the Islamic state, cannot be tried before an Islamic court that applies the Ḥanafī school of law for the reason given above, but if the court applies the Shāfiʿī, Mālikī or Ḥanbalī schools of law, these criminals can be tried and punished if proven guilty, provided that they are Muslims or *dhimmis* and the victims are Muslims or *dhimmis*. This means that for the majority of Muslim jurists, the perpetrators of the September 11 terrorist attacks could be tried in an Islamic court and receive the severe *ḥirābah* punishment if proven guilty because they are Muslims and among the victims there were Muslims and perhaps permanent non-Muslim citizens of an Islamic state.

The interesting question here now is whether accomplices in the crime of *ḥirābah* can be tried under the law of *ḥirābah*. This question also divides the classical jurists into two groups. The majority of jurists – the Ḥanfīs, Mālikīs, Ḥanbalīs and Ẓāhirīs – maintain that all accomplices who play any supporting role in the crime of *ḥirābah* such as spying, for example, without directly taking part in the acts of killing, robbing, terrorizing, etc., receive exactly the same *ḥadd* (prescribed) punishment as those who actually commit these acts. Accomplices deserve the same punishment because their contributions are essential for the success of the crime and those who actually commit the crime depend on these contributions. The other rationale also given by some jurists is that the accomplices should suffer the same punishment as the actual perpetrators just as they share the outcome of their

[222] Vogel, “The Trial of Terrorists under Classical Islamic Law”, p. 53.

crime. Thus, Ibn Taymiyyah confirms that if one among a group of *muḥāribūn* kills a victim while the rest are merely supporting him, then according to the majority of jurists the whole group should be executed even if there are 100 of them. However, al-Shāfiʿī argues that accomplices who have only a supporting role in committing the crime, without actually taking part, should not receive the punishment prescribed in the *ḥirābah* verse for the actual perpetrators, but rather a discretionary punishment and imprisonment. Similarly, if some among a group of *muḥāribūn* kill their victims while others only rob them, all of the group should be punished for both killing and robbing; that is, they should receive the death penalty and gibbeting, according to the majority. But according to al-Shāfiʿī, each member of the group would receive a punishment commensurate with the specific crime he committed.[223]

Therefore, based on the opinion of the majority of the jurists, Vogel rightly states that "an accomplice who helped the September 11 hijackers smuggle weapons onto the aircraft, or advised them by radio from the ground, might be indictable as a participant in *hiraba* and be liable to the same penalties as those who flew the planes."[224] Furthermore, according to the Islamic Fiqh Council Statement on Terrorism, referred to above, anyone who financed the September 11 hijackers, planned or even advocated their terrorist acts, should be tried and punished exactly like the hijackers themselves. To sum up here, a judge who follows the Ḥanafī school of law would not try the accomplices in this particular terrorist incident because it occurred outside the jurisdiction of the Islamic state, but a judge who follows the

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[223] Al-Sarakhsī, *Kitāb al-Mabsūt*, Vol. 9, p. 198; Ibn Mawdūd, *Al-Ikhtiyār*, Vol. 4, p. 122; al-Shaykh Niẓām, *Al-Fatāwā al-Hindiyyah*, Vol. 2, p. 187; al-Shāfiʿī, *Al-Umm*, Vol. 6, p. 152; al-Shirāzī, *Al-Muhadhdhab*, Vol. 3, p. 367; al-Qayrawānī, *Risālah*, p. 128; Aḥmad ibn Ghunaym ibn Sālim al-Nafarāwī, *Al-Fawākih al-Dawānī ʾalā Risālah Ibn Abī Zayd al-Qayrawānī* (Beirut: Dār al-Fikr, 1994-5/1415), Vol. 2, p. 204; al-Buhūtī, *Al-Rawḍ al-Murbiʾ*, Vol. 3, p. 331; Ibn Taymiyyah, *Al-Siyāsah al-Sharʾiyyah*, pp. 67 f.; al-Qurṭubī, *Al-Jāmiʾ*, Vol. 6, pp. 154 f.; ʿAwdah, *Al-Tashrīʾ al-Jināʾī al-Islāmī*, Vol. 2, pp. 641 f., 666-668; Nik Wajis, "The Crime of *Ḥirāba* in Islamic Law", pp. 165 f.; Jackson, "Domestic Terrorism in the Islamic Legal Tradition", p. 301.
[224] Vogel, "The Trial of Terrorists under Classical Islamic Law", p. 62.

Ḥanbalī or Mālikī school would try them and sentence the accomplices to death, while a judge who follows the Shāfiʿī school would merely impose a discretionary punishment and imprisonment.

The nature of the crime of *ḥirābah* makes its punishment the severest punishment in Islam[225] because this crime, Abū Zahrah explains, includes three main criminal elements: (1) challenging the state authorities by committing the crime publicly using organized force; (2) premeditated intention to commit the crime and (3) the many criminal acts committed such as killing, armed robbery, rape,[226] harm to the economy[227] and terrorism. Thus, the punishments of the amputation of *both* the hand and foot, and gibbeting, are not prescribed for any crime in Islam except *ḥirābah*. Moreover, Vogel points out that *ḥirābah* is "peculiar" in inflicting the same punishment on the accomplices as on the perpetrators, because "Ordinarily *hudud* crimes apply only to those who directly [*mubashara*] commit the elements of the crime."[228] Additionally, ʿAwdah and Anderson note, as explained below, that execution of the *muḥārib* if he kills his victim is compulsory and the victim's family has no right to waive the execution here because it is God's right/ society's right, unlike killing in non-*ḥirābah* contexts, where the victim's family are entitled to waive the execution altogether by completely pardoning the killer or by accepting payment of blood-money.[229] All this confirms that punishment of *ḥirābah* is the

[225] See Abū Zahrah, *Al-Jarīmah*, p. 76; Nik Wajis, "The Crime of *Ḥirāba* in Islamic Law", p. 225; Jackson, "Domestic Terrorism in the Islamic Legal Tradition", pp. 299 f.; al-Ḥaqīl, *Haqīqah Mawqif al-Islām*, p. 146.

[226] Abū Zahrah, *Al-Jarīmah*, p. 76.

[227] See Al-Qurṭubī, *Al-Jāmiʿ*, Vol. 6, p. 157; Jackson, "Domestic Terrorism in the Islamic Legal Tradition", pp. 299 f.

[228] Vogel, "The Trial of Terrorists under Classical Islamic Law", p. 62.

[229] ʿAwdah, *Al-Tashrīʿ al-Jināʾī al-Islāmī*, Vol. 2, p. 663. See also Anderson, "Homicide in Islamic Law", p. 812, footnote no. 3. Mohamed S. El-Awa explains that a *ḥadd* "punishment which is classified as *haqq Allah* [God's right] embodies three main aspects. The first is that this punishment is prescribed in the public interest; the second is that it cannot be lightened nor made heavier; and the third is that, after being reported to the judge, it is not to be pardoned either by him, by the political authorities, or by the victim of the offence", El-Awa, *Punishment in Islamic Law*, p. 1.

severest because it constitutes not only an aggression against the individual victims, but also an attack on the security, peace and economy of society as a whole.

However, although the harshest rules of engagement in any military confrontation regulated in Islamic law, whether international or domestic, are those that deal with fighting *muḥāribūn*, and although after their capture they receive the severest punishment prescribed in Islam, the *ḥirābah* verse states that their punishment is to be dropped if they repent and surrender themselves to the authorities before they are captured. Importantly, repentance must occur before their capture because, first, this proves that their repentance is genuine and not a deception to avoid punishment and, second, this encourages the criminals to repent and thus stop their acts of *ḥirābah*.[230]

However, the jurists commonly agree that what is to be dropped is only the part of the punishment categorized as *ḥudūd Allah*, i.e., the four Qur'ān-prescribed punishments for this crime (execution, gibbeting, amputation and exile/imprisonment) because these are the *ḥuqūq Allah* (the rights of God), and that the authorities are not entitled to drop the part of the punishment categorized as *ḥuqūq al-'ibād*/*al-ādamiyyin*[231] (the rights of the humans, or according to Jackson's

[230] Al-Kāsānī, *Badā'i' al-Ṣanā'i'*, Vol. 7, pp. 96 f.; Ibn Mawdūd, *Al-Ikhtiyār*, Vol. 4, p. 123; al-Shāfiʿī, *Al-Umm*, Vol. 6, p. 152; al-Shirāzī, *Al-Muhadhdhab*, Vol. 3, pp. 368 f.; al-Ghazālī, *Al-Wajīz*, Vol. 2, p. 178; al-Ghazālī, *Al-Waṣīt*, Vol. 6, p. 498; al-Shirbīnī, *Mughnī al-Muḥtāj*, Vol. 4, pp. 183 f.; al-Qarāfī, *Al-Dhakhīrah*, Vol. 12, pp. 133-136; al-ʿAbdarī, *Al-Tāj wa al- Iklīl*, Vol. 6, p. 317; ʿAllīsh, *Minaḥ al-Jalīl*, Vol. 9, pp. 347 f.; Ibn Qudāmah, *Al-Mughnī*, Vol. 9, pp. 129 f.; Ibn Mufliḥ, *Al-Mubdi'*, Vol. 9, p. 152; al-Rahaybānī, *Maṭālib*, Vol. 6, p. 255; al-Baʿlī, *Kashf al-Mukhaddarāt*, Vol. 2, p. 772; Abū Zahrah, *Al-'Uqūbah*, pp. 159-162; Ḥammīdullāh, *Muslim Conduct of State*, p. 189; Malekian, *The Concept of Islamic International Criminal Law*, p. 134; Nik Wajis, "The Crime of *Ḥirāba* in Islamic Law", pp. 94-97.

[231] Al-Sarakhsī, *Kitāb al-Mabsūt*, Vol. 9, pp. 198 f.; Ibn Najīm, *Al-Baḥr al-Rā'iq*, Vol. 5, p. 74; Ibn Mawdūd, *Al-Ikhtiyār*, Vol. 4, p. 123; al-Shāfiʿī, *Al-Umm*, Vol. 6, p. 152; al-Shirāzī, *Al-Muhadhdhab*, Vol. 3, pp. 368 f.; al-Qayrawānī, *Risālah*, pp. 127 f.; al-Qarāfī, *Al-Dhakhīrah*, Vol. 12, pp. 133-136; ʿAllīsh, *Minaḥ al-Jalīl*, Vol. 9, pp. 347 f.; Ibn Qudāmah, *Al-Mughnī*, Vol. 9, p. 129; Ibn Qudāmah, *'Umdah al-Fiqh*, p. 149; al-Mirdāwī, *Al-Inṣāf*, Vol. 10, pp. 299 f.; al-Buhūtī, *Al-Rawḍ al-Murbi'*, Vol. 3, p. 331; al-Buhūtī, *Kashshāf al-Qinā'*, Vol. 6, p. 153; Ibn Mufliḥ, *Al-Mubdi'*, Vol. 9, p. 152; al-Rahaybānī, *Maṭālib*, Vol. 6, p. 255; Abū Zahrah, *Al-'Uqūbah*, pp. 159-161; ʿAwdah, *Al-Tashrī' al-Jinā'ī al-Islāmī*, Vol. 2, p. 660; Nik Wajis, "The Crime of *Ḥirāba* in Islamic Law", pp. 93-95; Jackson, "Domestic Terrorism in the Islamic Legal Tradition", p. 301.

translation, civil liability),[232] because only the victims themselves or their heirs are entitled, if they so choose, to remit the part of the punishment which falls under the second category. Therefore, if a group of *muḥāribūn* kill, injure, amputate or rob their victims, the victims, or their heirs if the victims are killed, are entitled to demand or remit talion. So, if the perpetrators repent, the heirs of the murdered person are entitled to demand the execution of the killers, accept the payment of blood-money, or pardon them freely, because after the culprits have repented and turned themselves in to the authorities, the punishment falls into the second category of punishment in Islam, i.e., *qiṣāṣ* (*lex talionis*, retaliation) and is no longer under the category of *ḥudūd*. Likewise, the victims or their heirs are entitled to demand reimbursement of any stolen money and retaliation for injuries/amputations, or to remit talion in all of these cases.

**5.3 Terrorism**

One of the most important current issues in the study of Islam is the relationship between the terrorist acts perpetrated by Muslims, both domestic and international, and the teachings of Islam, particularly jihād. The implications for this issue are not merely scholarly or polemical, but also – and more importantly nowadays – political, military, and related to intelligence and security as well. This explains the recent involvement of some Western politicians,[233] military[234] and intelligence officers and

[232] Jackson, "Domestic Terrorism in the Islamic Legal Tradition", p. 301.

[233] For example, see Tony Blair, "A Battle for Global Values", *Foreign Affairs*, January/February 2007, pp. 79-90. Tony Blair was Prime Minister of the United Kingdom from 2 May 1997 to 27 July 2007.

[234] In addition to explaining how the U.S. can win the "war of ideas" on the so-called "war on terror", Antulio J. Echevarria II who "became the Director of Research for the U.S. Army War College after a military career of 23 years", describes this war as: "Externally, this war is an ideological struggle between the West, and in particular the United States, and terrorist groups, especially al-Qaeda and its spin-offs... Internally, this war is a battle over religious dogma within militant interpretation of the Koran and *shari'a* law, which would mobilize Muslims against the West, and thus lead to the purification of Islamic society and resurrect the greatness of the Caliphate", see Antulio J. Echevarria

institutions,[235] as well as journalists,[236] in discussions about the relationship between the teachings of the religion of Islam and these terrorist acts. The majority of the discussions of this issue in the West attribute the causes of these terrorist acts to "Islamic extremism" and not, as Tony Blair argues,[237] to certain regional conflicts and occupation of certain Muslim countries – which are the reasons given by the terrorists themselves.[238] Of this majority also, Melvin E. Lee, "a sea captain and a nuclear engineer in the United States Navy", argues that "Islamist terrorism" targeting the US is not motivated by US policies but by Islam itself, particularly jihād. Therefore, he suggests that "Only Islam's fundamental reform will resolve the conflict."[239]

Interestingly, it is worth adding here concerning the September 11 terrorist attacks that, Chiara Bottici and Benoît Challand point out that, unlike in Europe, in the US media "All the evidence pointing to the political dimensions of the [9/11] attacks was ignored if not actively deleted from the leading headlines."[240] Thus, tracing some of these "ignored", evaded[241] or "denied"[242] political and historical root

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II, "Wars of Ideas and *the* War of Ideas", available from http://www.strategicstudiesinstitute.army.mil/pubs/display.cfm?PubID=866; Internet; accessed 21 April 2009, pp. 23 f.

[235] For example, The Strategic Studies Institute of United States Army War College publishes several works addressing this issue.

[236] Griff Witte of the Washington Post reports from Kabul that violence is rarely explained by religion alone see, Griff Witte, "Violence: Its Sources is not always what it Seems", *Nieman Reports*, Summer 2007, 61, 2, pp. 6 f.

[237] Blair, "A Battle for Global Values", pp. 82-84.

[238] Dinah PoKempner states that terrorists are "acting for ideological ends of overturning corrupt governments and causing the United States and its allies to withdraw their presence, support, or influence from certain regions", Dinah PoKempner, "The 'New' Non-State Actors in International Humanitarian Law", *The George Washington International Law Review*, Vol. 38, No. 3, 2006, p. 551.

[239] Melvin E. Lee, "The Fallacy of Grievance-based Terrorism", *Middle East Quarterly*, Vol. 15, No. 1, Winter 2008, available from http://www.meforum.org/article/1830; Internet; accessed 27 April 2009. See also Ariel Cohen, "War of Ideas: Combating Militant Islamist Idealogy", *Georgetown Journal of International Affairs*, Vol. 5, Issue 1, Winter/Spring 2004, p. 114.

[240] Chiara Bottici and Benoît Challand, "Rethinking Political Myth: The Clash of Civilizations as a Self-Fulfilling Prophecy", *European Journal of Social Theory*, Vol. 9, Issue 3, 2006, p. 323.

[241] The American political scientist Chalmers Johnson argues that invoking the clash of civilizations theory is "a way of evading responsibility for the 'blowback' that U.S. imperial projects have generated", Chalmers Johnson, *The Nation*, October 15, 201, quoted in Lisa Wedeen, "Beyond the

causes of the September 11 attacks, Abdeen Jabara asserts that "Speaking before congress and elsewhere, President Bush ludicrously attempted to explain the motivation behind the attacks as opposition to American freedom and democracy."[243] David Ryan explains that Bush's rhetoric linking the terrorists' hatred of America to freedom and democracy was "thoroughly misguided" because it did not advance understanding of the root causes and true nature of the problem, but united American society and "facilitated" the military response.[244] That is to say that, "blaming Islam"[245] or, at best, its misinterpretation by extremists, for motivating such terrorist acts is easier than investigating the reasons for each terrorist incident and acknowledging that these terrorist actions are reactions to decisions taken by political leaders of Muslim or non-Muslim countries concerning particular conflicts or the occupation of specific countries. Interestingly, Graham E. Fuller, former vice chairman of the National Intelligence Council at the CIA and a renowned Western expert on the Muslim world, expresses it in similar terms:

> Islam is not the cause of such problems [i.e., tensions between East and the West, terrorism]. It may seem sophisticated to seek out passages in the Koran that seem to explain 'why they hate us.' But that blindly misses the nature of

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Crusades: Why Huntington, and bin Ladin, are Wrong", *Middle East Policy*, Vol. X, No. 2, Summer 2003, p. 56.

[242] David Ryan, "Framing September 11: Rhetorical Device and Photographic Opinion", *European Journal of American Culture*, Vol. 23, Vol. 1, 2004, p. 19.

[243] Abdeen Jabara, "September 11: Doesn't it have a Political and Historical Context?", *Guild Practitioner*, Vol. 58, 2001, p. 136. See also Ryan, "Framing September 11", pp. 7, 13, 19.

[244] Ryan, "Framing September 11", p. 18.

[245] Based on the largest and most comprehensive survey/study ever of contemporary Muslims living in more than thirty five countries conducted by the Gallup, John L. Esposito and Dalia Mogahed writes: "The catastrophic events of 9/11 and continued terrorist attacks in Muslim countries and in Madrid and London have exacerbated the growth of Islamophobia almost exponentially. Islam and Muslims have become guilty until proven innocent. The religion of Islam is regarded as the cause, rather than the context, for radicalism, extremism, and terrorism. But *blaming Islam* [emphasis added] is a simple answer, easier and less controversial than re-examining the core political issues and grievances that resonate in much of the Muslim World: the failures of many Muslim governments and societies, some aspects of U.S. foreign policy representing intervention and dominance, Western support for authoritarian regimes, the invasion and occupation of Iraq, or support for Israel's military battles with Hamas in Gaza and Hezbollah in Lebanon", John L. Esposito and Dalia Mogahed, *Who Speaks for Islam?: What a Billion Muslims Really Think, Based on Gallup's Poll – The Largest Study of its Kind* (New York: Gallup Press, 2007), pp. 136 f.

the phenomenon. How comfortable to identify Islam as the source of 'the problem'; it's certainly much easier than exploring the impact of the massive global footprint of the world's sole power.[246]

In fact, it is "comfortable" for each party to a conflict to blame the other party in general or the other party's religion for motivating acts of unjust war or terrorism because this makes each party feel psychologically that their religion and history are morally superior. Moreover, this relieves them of the psychological burden of belonging to the religion, culture or nationality of the party convicted, or even merely controversially accused, of committing genocide or massacres – even if such atrocities were committed hundreds or thousands of years ago. Here history plays an important part in shaping the relationship between different countries: identification of the nature of atrocities committed in the past, namely genocides or massacres, let alone identifying whether such atrocities were committed by one party or by both parties to a conflict, strongly affects inter-state relations at present. The most notable examples here are the Turkish-Armenian, the French-Algerian and, more recently, the Sudan-Darfur conflicts.

Because of "the highly charged political and emotional" nature of the issue of terrorism, Colin Wight insightfully points out that one of the problems in terrorism studies is the unwarranted "claims that any attempt to explain the root causes of terrorism is to excuse it."[247] But, as Ryan affirms, it is impossible to understand, let

[246] Graham E. Fuller, "A World without Islam", *Foreign Policy*, Jan/Feb 2008, Issue 164, p. 53.
[247] Colin Wight, "Theorising Terrorism: The State, Structure and History", *International Relations*, Vol. 23, No. 1, 2009, p. 99. According to Susan Tiefenbrun, "It is not defensible to argue that terrorism needs to be viewed from a political context and that the 'motivation' of the actor and the sociological context in which the act occur must be taken into consideration. Such an approach would legitimize terrorist acts by claiming that the ends justify the means." Indeed, this argument is flawed; knowing and studying the motivations and causes of something does not justify it. On the contrary, knowing the motivations of terrorism is the first step to tackle it and the second step to prevent it, as explained below by M. Cherif Bassiouni, is to address these causes. Susan Tiefenbrun, "A Semiotic Approach to a Legal Definition of Terrorism", *ILSA Journal of International and Comparative Law*, Vol. 9, 2002-2003, p. 389.

alone tackle, the problem of terrorism without its contextual causes.[248] Furthermore, investigating the root causes of terrorism might mean in some cases that those who create these root causes may share part of the blame. A prime example here is the root causes of suicide bombings. The findings of the study by Robert A. Pape, the leading world authority on suicide terrorism,[249] of worldwide suicide terrorist attacks since 1980 confirm that:

> suicide terrorism is mainly the product of foreign military occupation… It is not, as the conventional wisdom holds, mostly a product of religious extremism independent of political circumstances.[250]

His study also shows that "the world leader in suicide terrorism is the Tamil Tigers in Sri Lanka, a group that adheres to a Marxist/Leninist ideology".[251] The highly charged political, psychological and emotional nature of the treatment of terrorism in general, and suicide terrorism in particular, is reflected in the reactions to Pape's findings. David Bukay, of the University of Haifa, insists that occupation is not the root cause but the religion of Islam and particularly jihād.[252] More specifically, Robert Spencer claims that the Qur'ānic promise (9:111) "of Paradise to those who

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[248] Ryan, "Framing September 11", p. 19.

[249] Robert A. Pape is a tenured professor of political science at the University of Chicago and Director of the Chicago Project on Suicide Terrorism.

[250] Robert A. Pape, "Methods and Findings in the Study of Suicide Terrorism", *American Political Science Review*, Vol. 102, No. 2, May 2008, p. 275. See also Robert A. Pape, "The Strategic Logic of Suicide Terrorism", *The American Political Science Review*, Vol. 97, No. 3, August 2003, pp. 343-361; Robert A. Pape, *Dying to Win: The Strategic Logic of Suicide Terrorism*, paperback ed. (New York: Random House, 2006); Robert A. Pape, *Dying to Win: Why Suicide Terrorists do it* (London: Gibson Square, 2006). For a critique of Pape's sampling method, see Scott Ashworth et al., "Design, Inference, and the Strategic Logic of Suicide Terrorism", *American Political Science Review*, Vol. 102, No. 2, May 2008, pp. 269-273. For Pape's response to this critique see, Pape, "Methods and Findings", pp. 275-277.

[251] Pape, "The Strategic Logic of Suicide Terrorism", p. 343.

[252] David Bukay, "The Religious Foundations of Suicide Bombings: Islamist Ideology", *Middle East Quarterly*, Fall 2006, Vol. XIII, No. 4, available from http://www.meforum.org/1003/the-religious-foundations-of-suicide-bombings; Internet; accessed 28 April 2009; David Bukay, "Peace or Jihad? Abrogation in Islam", *Middle East Quarterly*, Fall 2007, Vol. XIV, No. 4, pp. 3-11, [article online]; available from http://www.meforum.org/1754/peace-or-jihad-abrogation-in-islam; Internet; accessed 26 August 2009. See also Jonathan Fine, "Contrasting Secular and religious Terrorism", *The Middle East Quarterly*, Vol. 15, Issue no. 1, winter 2008, available from http://www.meforum.org/article/1826 Internet; accessed 12 Feb. 2008;

‘kill and are killed’ for Allah”[253] is the cause of such terrorist acts. Based on research on the Kashmir crisis, Amritha Venkatraman of the Delhi Policy Group in India argues that the Qur’ān, its extreme interpretations and particularly jihād are the causes of terrorism.[254]

In fact, identifying the nature and root causes of terrorism and, consequently, the way it is treated politically are largely influenced by the background or discipline, not to mention the *interests,* of those studying or treating it. A brief survey of the discussions of terrorism in various disciplines shows the chaos that exists in identifying its nature and root causes. In other words, specialists in religious studies, sociologists, psychologists, economists, etc., usually interpret the nature and roots causes of terrorism from the perspective of the theories and methodologies of their disciplines and in so doing, in many cases, they misrepresent the nature and causes of this phenomenon.[255] For example, Loretta Napoleoni, an economist who has authored some works on terrorism, argues that both the Crusades and the modern jihād/terrorism are “motivated far more by economic factors than by religious fervor.”[256] Colonel Laurence Andrew Dobrot also identifies economic factors – mainly economic deprivation in the Muslim countries – as the first of three root causes for terrorism, in addition to the Western exploitation of the Muslim World

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[253] Robert Spencer, “Robert Pape is Wrong: Suicide Bombing is frequently Motivated by Islamic tenets”, available from http://www.jihadwatch.org/archives/019592.php; Internet; accessed 28 April 2009.
[254] Amritha Venkatraman, “Religious Basis for Islamic Terrorism: The Quran and its Interpretations”, *Studies in Conflict & Terrorism*, Vol. 30, Issue 3, 2007, pp. 229-248.
[255] See, for example, on analysing the Qur’ānic basis of Usama bin Laden’s argumentation in two of his documents see, Rosalind W. Gwynne, “Usama bin Ladin, the Qur’an and Jihad”, *Religion*, 36, 2006, pp. 61-90. J.S. Piven, “Psychological, Theological, and Thanatological Aspects of Suicidal Terrorism”, *Case Western Reserve Journal of International Law*, Vol. 39, No. 3, 2007/2008, pp. 731-758; Oberschall, Anthony. “Explaining Terrorism: The Contribution of Collective Action Theory”, *Sociological Theory*, Vol. 22, No. 1, March 2004, pp. 26-37; Maria T. Miliora, “The Psychology and Ideology of an Islamic Terrorist Leader: Usama bin Laden”, *International Journal of Applied Psychoanalytic Studies*, Vol. 1, No. 2, 2004, pp. 121-139.
[256] Loretta Napoleoni, “Modern Jihad: the Islamist Crusade”, *SAIS Review*, Vol. XXIII, No. 2, Summer-Fall 2003, p. 53. See also Loretta Napoleoni, *Modern Jihad: Tracing the Dollars behind the Terror Networks* (London: Pluto Press, 2003).

and US foreign policy.[257] However, Olivier Roy argues that: "International Islamic terrorism is a pathological consequence of the globalisation [and in another place he adds Westernization and immigration] of the Muslim world rather than a spillover of the Middle Eastern conflicts."[258] On the basis of an assessment of Usama bin Laden's personality, Maria T. Miliora strangely concludes that bin Laden, following the model of the Prophet Muhammad, is waging an apocalyptic war against the United States to bring global victory to Islam as, Miliora wrongly alleges, did the Prophet in the seventh century.[259] Admittedly influenced by Daniel Pipes' analysis,[260] Patrick Sookhdeo adamantly, but unreasonably, argues that "Unless the militant interpretation of Islamic sources is recognised as the basic cause of Islamic terrorist activities, there is little hope of a lasting solution."[261] These few examples are given here to show that, as far as the root causes of such terrorist acts are concerned, unless the perpetrators and accomplices of such acts reveal them, police and intelligence officers usually have more reliable sources of information on the causes of each incident than the predictions and hypotheses of researchers and journalists. Thus, for the study of cases of terrorism labelled as "Islamic terrorism", it is of paramount importance that both the root causes of these acts and the position of Islamic law regarding them should be taken into consideration for any objective

[257] Laurence Andrew Dobrot, "The Global War on Terrorism: A Religious War?", available from http://www.strategicstudiesinstitute.army.mil/pdffiles/pub822.pdf; Internet; accessed 28 April 2009, p. 6. Colonel Laurence Andrew Dobrot is the Deputy Director for the Missile Defence Agency's Airborne Laser Programme in the United States.

[258] Olivier Roy, *Globalized Islam: The Search for a New Ummah* (New York: Columbia University Press, 2004), p. 337. He also writes that: "The current violence is not so much an import from the Middle East (where bin Laden's networks are passive) as it is a product of Westernization, immigration, globalization – and the society of the spectacle, with its disaster films and video games. The target was designed long ago", Olivier Roy, "Bin Laden: An Apocalyptic Sect Severed from Political Islam", *East European Constitutional Review*, Vol. 10, Fall 2001, p. 114.

[259] Miliora, "The Psychology and Ideology of an Islamic Terrorist Leader", pp. 121-139.

[260] Daniel Pipes, "Know thy Terrorists." *New York Post*, 19 November 2002, available from http://www.danielpipes.org/943/the-need-to-name-and-know-thy-terrorists; Internet; accessed 30 April 2009.

[261] Patrick Sookhdeo, *Understanding Islamic Terrorism: The Islamic Doctrine of War* (Pewsey: Isaac Publishing, 2004), p. 221.

study or political treatment of the issue. Put differently, in the words of M. Cherif Bassiouni, "The control of its [terrorism, in general] manifestations depends on international cooperation, but its prevention requires addressing its causes."[262]

The flaw in the unfounded claims that link incidents of terrorism to the religion of Islam is that they tend, practically speaking, to whitewash the effects of occupation and hence to deny the political dimensions of these terrorist acts by simply blaming certain Qur'ānic verses or radical interpretations of Islam. Furthermore, such claims blur the distinction between the root causes of terrorism and the rationales, which may be couched in religious terms or based on religious interpretations, for the resort to violence. In other words, identifying the perpetrators/victims and the place/time of such terrorist acts can explain why they take place. But the claims that Islam, the Qur'ān or jihād motivate terrorism certainly fail to explain why the perpetrators target specific victims at specific times and places. Moreover, the same root causes create the same terrorist acts, irrespective of whether the justifications for them are couched in religious, secular or nationalist rationales or otherwise. Nonetheless, such claims sometimes find resonance with the widely held belief in the West that religions have historically motivated violence, but the danger the claims in scholarly and popular literature, as well as the mass media, that commonly attribute the causes of terrorism to Islam is that, ironically, they make the same mistake as that made by the Muslim terrorists who portray themselves as fighting a defensive war[263] "to liberate Al-Aqsa Mosque and the holy sanctuary" – in

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[262] M. Cherif Bassiouni, "Legal Control of International Terrorism: A Policy-Oriented Assessment", *Harvard International Law Journal*, Vol. 43, No. 1, Winter 2002, p. 103. Also Joseph F. Pilat states that "our response to global Jihad and other forms of terrorism will be affected by our understanding of its causes, as well as by possible political requirements to address widespread perceptions of causes." See Joseph F. Pilat, "The Causes of Terrorism", *Journal of Organizational and Transformation and Social Change*, Vol. 6, No. 2, 2009, p. 181.

[263] J.M.B. Porter, "Osama Bin Laden, Jihād, and the Sources of International Terrorism", *Indiana International and Comparative Law Review*, Vol. 13, No. 3, 2003, pp. 871, 881, 883-885; Maurits Berger, "Islamic Views on International Law", in Paul Meerts, ed., *Culture and International Law*

Palestine and Saudi Arabia respectively – from: the religiously and economically motivated occupations of the enemy they describe as "Jews and Crusaders."[264]

This is not to say that these terrorists do not resort to Islam to sanction their terrorist acts, but ignoring the real causes behind these terrorist acts and presenting them as religiously motivated is, indeed, misleading. Because instead of the exact nature of this phenomenon being described so that its roots can be tackled, it is simply portrayed as a "clash of civilizations/culture", a battle of "values", "ideas" or "ideologies". More importantly, this misrepresentation of the nature and root causes of these terrorist acts complicates the treatment of the issue by identifying the "civilization", "culture", "values", "ideas" or "ideologies" attributed to the religion of Islam as the enemy or the cause of this conflict. This is because, first, Muslims all over the world find that their religion is being wrongly considered to be the enemy of others in this so-called 'war' and, second, this misrepresentation of the nature and root causes of these terrorist acts in itself adds a religious dimension to the overall nature of the conflict.

Fortunately, United States President Barack Obama recently corrected the misrepresentation of this issue during his first visit to a Muslim country as US president. In an address to the Turkish Parliament on 6 April 2009, President Obama

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(Hague: Hague Academic Press/T.M.C. Asser Press; West Nyack, NY: Cambridge University Press, 2008), p. 106; T.R. Copinger-Symes, "Is Osama bin Laden's '*Fatwa* Urging *Jihad* against Americans' dated 23 February 1998 Justified y Islamic Law?", in Mashood A. Baderin, ed., *International Law and Islamic Law* (Aldershot: Ashgate, 2008), pp. 226-229.

[264] Osama bin Muhammad Bin Laden et al., "World Islamic Front Statement Urging Jihad against Jews and Crusaders", in Gilles Kepel and Jean-Pierre Milelli, eds., *Al Qaeda in its Own Words*, Trans. Pascale Ghazaleh (Cambridge, MA: The Belknap Press of Harvard University Press, 2008), pp. 53-56. The religious and economic nature of this war is portrayed by the signatories of this Statement in the following words: "the United States has been occupying the most sacred of the Islamic lands, the Arabian Peninsula, plundering its riches, dictating to its rulers, humiliating its people, terrorizing its neighbors… if the war aims of the Americans are *religious and economic* [emphasis added], they also have the effects of serving the Jews' petty state and diverting attention from its occupation of Jerusalem and murder of Muslims there", Bin Laden et al., "World Islamic Front Statement Urging Jihad against Jews and Crusaders", pp. 53 f. See also Bernard Lewis, "Licence to Kill: Usama bin Ladin's Declaration of Jihad", *Foreign Affairs*, Vol. 77, No. 6, November/December 1998, p. 14; Pilat, "The Causes of Terrorism", pp. 175 f.

simply and emphatically asserts: “Let me say this as clearly as I can: the United States is not and never will be at war with Islam.”[265] Significantly, out of the whole of the President’s speech, this exact phrase made major headlines in newspapers in different parts of the world such as Turkey, Lebanon, Qatar, UK, USA and China.[266] Moreover, on 4 June 2009, Obama reiterated exactly the same phrase in a historic speech addressed to the Muslim world from Cairo University: “America is not -- and never will be -- at war with Islam.”[267] This statement indicates the concern of President Obama to avoid the negative impact of attributing such terrorist acts to the Islamic faith on US relations with the Muslim world. But over a year earlier, elegantly and more emphatically, the caption of an article entitled “A World without Islam” by Fuller in the *Foreign Policy* argues:

> What if Islam had never existed? To some, it’s a comforting thought: No clash of civilizations, no holy wars, no terrorists. Would Christianity have taken over the world? Would the Middle East be a peaceful beacon of

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[265] Barack Obama, “Remarks of President Barack Obama – As Prepared for Delivery Address to Turkish Parliament, Ankara, Turkey, April 6, 2009”, available from http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/06_04_09_obamaspeech.pdf; Internet; accessed 26 April 2009, p. 6. The words quoted above are the exact words delivered by President Obama, but the original text prepared for this address did not contain the phrase “and never will be”.

[266] See, for example, Sermin Kence, “President Obama: U.S. is not and never will be at war with Islam”, available from http://www.turkishweekly.net/news/71108/president-obama-u-s-is-not-and-never-will-be-at-war-with-islam.html; Internet; accessed 26 April 2009; The Daily Star, “US will never be at war with Islam, Obama tells Turkey”, available from http://www.dailystar.com.lb/article.asp?edition_id=10&categ_id=2&article_id=100757; Internet; accessed 26 April 2009; Al Jazeera English. “Obama: ‘US is not at war with Islam’”, available from http://english.aljazeera.net/news/europe/2009/04/20094611538303268.html; Internet; accessed 26 April 2009; Toby Harnden, “Barack Obama in Turkey: US ‘Will never be at war with Islam”, available from http://www.telegraph.co.uk/news/worldnews/northamerica/usa/barackobama/5115044/Barack-Obama-in-Turkey-US-will-never-be-at-war-with-Islam.html; Internet; accessed 26 April 2009; Yigal Schleifer, “In Turkey, Obama says US not at war with Islam”, available from http://www.csmonitor.com/2009/0406/p06s03-woeu.html; Internet; accessed 26 April 2009; Christi Parsons and Laura King, “In Turkey, Obama say U.S. is not at war with Islam”, available from http://www.latimes.com/news/nationworld/world/la-fg-obama-turkey7-2009apr07,0,641778.story; Internet; accessed 26 April 2009; China Daily, “Obama: US not at war with Islam”, available from http://www.chinadaily.com.cn/cndy/2009-04/07/content_7652587.htm; Internet; accessed 26 April 2009.

[267] Barack Obama, “Remarks by the President on a New Beginning”, available from http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-at-Cairo-University-6-04-09/; Internet; accessed 11 June 2009.

democracy? Would 9/11 have happened? In fact, remove Islam from the path of history, and the world ends up exactly where it is today.[268]

Of the many different approaches to the study of terrorism – just like the study of war – such as those of political science, sociology, psychology, ethics, economics, etc., the legal approach is the most important in tackling this issue, but, disappointingly, the world has failed from the 1920s until the present to agree on a universally accepted legal definition of terrorism.[269] Strangely enough, however, some argue that reaching a legal definition for terrorism "is not really necessary… [nor] would even be beneficial."[270] This failure constitutes one of the major problems in the study and treatment of the subject. According to the words of Jack P. Gibbs "it is no less 'manifestly absurd' to pretend to study terrorism without at least some kind of definition of it. Leaving the definition implicit is the road to obscurantism."[271] This lack, or disbelief in the necessity of a consensus on an accepted legal definition of terrorism is presumably due to primarily both political and legal apprehensions.[272] The catching cliché coined by US president Ronald Reagan: "one man's terrorist is another man's freedom fighter" partially reflects what Golder and Williams call "the

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[268] Fuller, "A World without Islam", p. 46.

[269] According to Geoffrey Levitt, "The first organized international legal attempts to grapple with the problem of defining terrorism came in the series of conferences collectively known as the International Conferences for the Unification of Penal Law, which were held in various European capitals during the 1920s and 1930s", Geoffrey Levitt, "Is 'Terrorism' Worth Defining?", *Ohio Northern University Law Review*, Vol. 13, 1986, p. 97. See also Walter Gary Sharp, "The Use of Force against Terrorism: American Hegemony or Impotence?", *Chicago Journal of International Law*, Vol. 1, No. 1, 2000, p. 39; Ben Golder and George Williams, "What is 'Terrorism'? Problems of Legal Definition", *University of New South Wales Law Journal*, Vol. 27, No. 2, 2004, pp. 270, 273. On the problem of the legal definition of terrorism see, Karima Bennoune, "Terror/Torture", *Berkeley Journal of International Law*, Vol. 26, No. 1, 2008, pp. 19-27.

[270] Levitt, "Is 'Terrorism' Worth Defining?", p. 115. Jeremy Waldron adds that "Surely what matters is what we do about terrorism, not how we define it", see Jeremy Waldron, "Terrorism and the Uses of Terror", *The Journal of Ethics*, Vol. 8, Issue 1, 2004, p. 6.

[271] Jack P. Gibbs, "Conceptualization of Terrorism", *American Sociological Review*, Vol. 54, No. 3, January 1989, p. 329.

[272] However, Susan Tiefenbrun identifies another two major obstacles that must be overcome to reach a universally accepted definition of terrorism. First, differentiating between "terrorism as a crime in itself, terrorism as a method to prepare other crimes, and terrorism as an act of war… [and second] resolv[ing] its underlying paradoxes", Tiefenbrun, "A Semiotic Approach to a Legal Definition of Terrorism", pp. 359 f.

inescapably political nature" of terrorism.[273] This political dimension of the treatment of terrorism or the "shortage of political will" is the barrier to developing a legal system that can effectively combat terrorism, Keith Suter affirms.[274] That is to say that, if a consensus is reached on a legal definition of terrorism, then judging whether someone is a terrorist or a freedom fighter will be determined according to that definition, irrespective of who is judging.[275] The legal apprehension, which is also partly political, is that the acts, methods, elements, nature and motivations that constitute terrorism change with time and circumstances. Thus, understandably enough, there is a danger that accused terrorists may escape punishment for terrorism if their actions do not fit within the exact, universally accepted legal definition of terrorism that is called for. These political and legal apprehensions, which have partially hindered the arrival at a legal consensus on a definition of terrorism, appear to assume that, once a definition is accepted, it could not be changed, but, since terrorism is an ever changing phenomenon, partly because of the different root causes creating it, defining it and legislating against it must address these changes. In other words, defining what constitutes "terrorism" should be a continuing endeavour[276] since the nature, acts, methods, tactics, and motives of terrorists

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[273] Golder and Williams, "What is 'Terrorism'? Problems of Legal Definition", p. 272. It is worth adding here that Richards Goldstone and Janine Simpson confirm that "Among the many problems terrorism poses is a familiar crux of international law: the failure of attempts by the community of nations to find an acceptable legal definition of terrorism. The principal reason for this aporia is that members of the international community have failed to agree whether 'freedom fighters' should be included in such a definition." Richards Goldstone and Janine Simpson, "Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism", *Harvard Human Rights Journal*, Vol. 16, 2003, p. 13.

[274] Keith Suter, "September 11 and Terrorism: International Law Implications", *Australian International Law Journal*, 2001, pp. 15, 34.

[275] Put differently, in the words of Alex P. Schmid and A.J. Jongman, "The question of definition of a term like terrorism can not be detached from the question of who is the defining agency", Alex P. Schmid and A.J. Jongman, *Political Terrorism: A Research Guide to Concepts, Theories, Data Bases and Literature* (Amsterdam: North-Holland Publishing Company, 1984), p. 6.

[276] In this context, Golder and Williams refers to "… the fact that legislating against terrorism is an exercise involving constant negotiation and renegotiation of law in a climate where national security is seen as a pressing political imperative", Golder and Williams, "What is 'Terrorism'? Problems of Legal Definition", p. 295.

throughout history have been changing, and most probably will continue to change – unfortunately more catastrophically.[277]

Moreover, one of the problems to be overcome in reaching a legal definition of terrorism is to determine whether the specific acts committed by the culprits can be tried under the laws of terrorism or should be tried as other crimes, such as murder, hijacking, sabotage, hostage-taking, etc. It appears that this depends somewhat on the motives of the perpetrators. According to Geoffrey Levitt of the US Department of State's Office of Combating Terrorism: "Not all hijackings, sabotages, attacks on diplomats, or even hostage-takings are 'terrorist'; such acts may be done for personal or pecuniary reasons or simply out of insanity."[278] But the motives of the perpetrators of such heinous crimes should not dictate whether they are to be punished as terrorists or otherwise. Thus, Alex P. Schmid and A.J. Jongman appear to agree here that the motives of terrorists "do not have to be part of a definition" of terrorism.[279] Determining the nature of a crime and therefore the severity of its punishment should be based on the seriousness of the crime, the degree of harm and the severity of the injuries it inflicts upon its victims and society as a whole. The mere fact of associating terrorism primarily with political motivations[280] indicates the tendency to give a harsher punishment to the enemies of the state or of those in government rather than the fulfilment of justice, irrespective of who are the

[277] Here M. Cherif Bassiouni writes: "Terrorism has existed, in one form or another, in many societies for as long as history has been recorded. The differences between its various manifestations, however, have been as to methods, means, and weapons. As the means of terrorism available to inflict significant damage to society improve, the harmful impact of terrorism increase. And as weapons of mass destruction become more accessible, the dangers to the world community increase", Bassiouni, "Legal Control of International Terrorism", p. 83.

[278] Levitt, "Is 'Terrorism' Worth Defining?", p. 115.

[279] Schmid and Jongman, *Political Terrorism*, p. 100.

[280] According to the words of Todd Sandler: "To qualify as terrorism, an act must be politically motivated; that is, the act must attempt to influence government policy at home or abroad. Incidents that are solely motivated for profit and do not directly or indirectly support a political objective are not considered to be terrorism", Todd Sandler, "Collective Action and Transnational Terrorism", *The World Economy*, Vol. 26, Issue 6, 2003, p. 780.

victims and the motivations of the criminals. Although the crime of *ḥirābah* distinguishes between the crimes of killing or inflicting bodily damage upon the victims and the same criminal acts committed in the context of the crime of *ḥirābah*, it does not base this distinction upon the motives of the culprits[281] or who are the victims: as long as the elements of the crime of *ḥirābah* exist, the culprits are punished accordingly.

Therefore, this study strongly advocates the necessity of reaching a world consensus on a legal definition of terrorism[282] and establishing an international legal body[283] that will be responsible for trying at least perpetrators of international terrorism and, no less importantly, the perpetrators of state terrorism and those involved in state-sponsored terrorism.[284] But as for the position of Islamic law on

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[281] See Abou El Fadl, "Islam and the Theology of Power", p. 31.

[282] Tiefenbrun states that "It is hard to believe that a word like 'terrorism,' which is used so frequently these days in different contexts and in casual, colloquial, political, and legal discourses, does not have a universally-accepted definition. It is not enough to say, as United States Supreme Court Justice Potter Stewart one said of pornography, 'we know it when we see it.' Terrorism must be deconstructed to distinguish between domestic and international terrorism, state-sponsored and non-state sponsored terrorism, and terrorism per se and legal revolutionary violence that falls within the law of war… [Therefore, writing in 2003, Tiefenbrun confirms that] The time has come to take a more active approach to defining the term terrorism", Tiefenbrun, "A Semiotic Approach to a Legal Definition of Terrorism", pp. 358, 388. Golder and Williams agree that "Today, it is clearly necessary to develop a coherent legal description of terrorism", Golder and Williams, "What is 'Terrorism'? Problems of Legal Definition", p. 271. Jörg Friedrichs persuasively argues that a universally accepted legal definition of terrorism will help the international society fight against terrorism and will curb the hegemonic power to determine who is the terrorist, see Jörg Friedrichs, "Defining the International Public Enemy: The Political Struggle behind the Legal Debate on International Terrorism", *Leiden Journal of International Law*, Vol. 19, 2006, pp. 69-91.

[283] It is interesting to find that M. Cherif Bassiouni, writing in 2002 following the September 11 attacks, expressed the same idea. In the words of a world leading expert in the area, Bassiouni suggests: "If we want to put an end to the forms of violence that we call terrorism, then we need an effective *international legal regime* [emphasis added] with enforcement capabilities that can, as Aristotle once said, apply the same law in Athens as in Rome", Bassiouni, "Legal Control of International Terrorism", p. 103.

[284] On state terrorism see, Suter, "September 11 and Terrorism", pp. 22-25. On the difference between state terrorism and state-sponsored terrorism see, Bassiouni, "Legal Control of International Terrorism", pp. 84 f. Regarding the importance of trying those behind state-sponsored terrorism, Bassiouni also agrees and even more emphatically warns that: "The exclusion of state actors' unlawful terror-violence acts from inclusion in the overall scheme of terrorism control highlights the double standard that non-state actors lament and use as a justification for their own transgression." Even more disappointingly, Bassiouni reveals that "governments have avoided developing an international legal regime to prevent, control, and suppress terrorism, preferring instead the hodgepodge of thirteen treaties that currently address its particular manifestations. The absence of a coherent international legislative policy on terrorism is consistent with the *ad hoc* and discretionary approach that governments have taken toward the development of effective international legal responses to

acts of terrorism perpetrated by Muslims, it stands to reason that classical Islamic law, in particular, and modern Islamic legal bodies and specialist in Islamic law – who in turn rely on classical Muslim jurists – are the sources to be used in investigating this question. It is essential to determine whether such terrorist acts are Islamically justifiable by judging them according to Islamic law itself and not merely accepting at face value the terrorists' justifications for their acts as Islamic. That is to say, the terrorists', or any other Muslims', interpretations of Islam should be judged according to Islam itself and not vice versa. Islam should not be blamed when it is misinterpreted, just as, for example, international law is not blamed when states or non-state actors give a manipulated or distorted interpretation of it to justify illegal offensive wars or military operations. Moreover, when international law is misused to justify offensive war, it is never identified or blamed as the root cause for such war, as is regrettably the case with Islam.[285]

Despite the particular necessity for a scholarly Islamic legal treatment of terrorism, especially since some allegedly attribute the causes of terrorism perpetrated by Muslims to Islam, "there has yet to appear a solid Islamic legal treatment of terrorism",[286] Jackson rightly notes. An Islamic legal treatment of

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terrorism", Bassiouni, "Legal Control of International Terrorism", p. 102. Furthermore, he explains that "the United States has consistently opposed such a [comprehensive convention on terrorism] since 1972, ostensibly so that it can pick and choose from these disparate norms those that it wishes to rely upon. Above all, the United States does not want to have an effective multilateral scheme that would presumably restrict its unfettered political power to act unilaterally", Bassiouni, "Legal Control of International Terrorism", p. 92. Similarly, Friedrichs strongly argues that some Western countries, the United States, in particular, and the United Kingdom have "opposed a definition of terrorism as being counter-productive and called for practical measures instead", Friedrichs, "Defining the International Public Enemy", p. 74. Friedrichs explains this the lack of a definition is advantageous for the United States because in this way it can determine who are the terrorists and who are not "on a case-by-case basis", Friedrichs, "Defining the International Public Enemy", pp. 69 f., 70, 88-90.

[285] For example, the Bush's doctrine, referring to President George W Bush's justification for the invasion of Iraq in 2003 on the basis that Iraq was causing "*potential*" national security threats to the United States, is still challenged to be "incompatible with international legal constraints on resort to force", see Nicole Deller and John Burroughs, "Jus ad Bellum: Law Regulating Resort to Force", *Human Rights Magazine*, Winter 2003, Vol. 30, Issue 1, p. 8.

[286] Jackson, "Domestic Terrorism in the Islamic Legal Tradition", p. 293. It should be mentioned here that this article of Jackson remains the best treatment of terrorism from the Islamic legal perspective

terrorism is lamentably lacking in Western literature, because of the highly technical, archaic and contextual nature of classical Islamic law. But more importantly, any attempt to study terrorism from the perspective of Islamic law will face the general problem in terrorism studies which Wight describes as follows: “It is difficult to research something that seems to defy definition: where should one start; where should one finish?”[287] That is to say, in order to answer the sixth question posed at the beginning of this chapter on whether classical Muslim jurists treated terrorism – international and domestic – or not, terrorism itself must be clearly defined. Over three decades ago Alex P. Schmid and A.J. Jongman of the University of Leiden identified 109 definitions of terrorism. Now, the number of these definitions can be expected to have increased. Yet, Bassiouni, the co-founder of the field of international criminal law, maintains that terrorism “has never been satisfactorily defined”,[288] despite the fact that many countries throughout the world currently have their own definitions. In addition to the United Nations’ definition,[289] each of the United States, Canada, the United Kingdom, France, Australia and South Africa,

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of the works studied here. Vogel’s short Essay is a laudable contribution to the discussion of the punishment of terrorists in Islamic law see, Vogel, “The Trial of Terrorists under Classical Islamic Law”, pp. 53-64.

[287] Wight, “Theorising Terrorism”, p. 99. Roberta Senechal De la Roche points out to the same problem for the scientific study of terrorism from the sociological perspective in the following words: “Without a useful definition of terrorism, a theory of the subject [i.e., terrorism] is not even possible. How do we identify a case of terrorism? What characteristics distinguish it from other collective violence?”, Roberta Senechal De la Roche, “Toward a Scientific Theory of Terrorism”, *Sociological Theory*, Theories of Terrorism: A Symposium, Vol. 22, No. 1, March 2004, p. 1.

[288] Bassiouni, “Legal Control of International Terrorism”, p. 101. Professor Zdzislaw Galicki of the University of Warsaw adds here that “the question of defining international terrorism remains the most difficult and unsatisfactorily solved for all engaged in the process of elaboration of antiterrorist treaties, either universal or regional”, Zdzislaw Galicki, “International Law and Terrorism”, *The American Behavioral Scientist*, Vol. 48, No. 6, February 2005, p. 745.

[289] The United Nations General Assembly Resolution 54/109 defined terrorism on 9 December 1999 as: “Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature, that may be invoked to justify them”, Tiefenbrun, “A Semiotic Approach to a Legal Definition of Terrorism”, pp. 375-379. See also on the United Nations’ efforts to define and concluding treaties against terrorism, Suter, “September 11 and Terrorism”, pp. 27-31.

among other countries, have their own definition/s of terrorism.[290] In the United States alone there are several definitions: the Federal Bureau of Investigation (FBI), the Department of State and the Department of Defense, each have their own definition of terrorism. This has led Susan Tiefenbrun to conclude that "In the United States there is a general confusion about what constitutes terrorism",[291] which consequently has "engendered considerable puzzlement",[292] William H. Lewis explains.

In an attempt to give a possible answer to the sixth question posed at the beginning of this chapter, the following three definitions adopted by the three US institutions mentioned above will be considered here as the yardsticks by which to determine whether the classical Muslim jurists treated terrorism or not. First, according to the FBI definition, terrorism is:

> "the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in the furtherance of political or social objectives."[293]

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[290] For the definitions of terrorism in these countries see, for example, Golder and Williams, "What is 'Terrorism'? Problems of Legal Definition", pp. 275-286; Tiefenbrun, "A Semiotic Approach to a Legal Definition of Terrorism", pp. 363-375.

[291] Tiefenbrun, "A Semiotic Approach to a Legal Definition of Terrorism", p. 363. Tiefenbrun adds that "The absence of a generally-accepted definition of terrorism in the United States allows the government to craft variant or vague definitions which can result in an erosion of civil rights and the possible abuse of power by the state in the name of fighting terrorism and protecting national security", Tiefenbrun, "A Semiotic Approach to a Legal Definition of Terrorism", p. 364. Therefore, if such absence of an accepted definition of terrorism in the US can lead, or more accurately have already led, to the abuse of power in this country, then the possibility is far greater that power will be abused if this anarchy of defining terrorism still exits throughout the whole universe.

[292] William H. Lewis, "The War on Terror: A Retrospective", *Mediterranean Quarterly*, Fall 2002, p. 27.

[293] Definition available from the FBI website: http://denver.fbi.gov/nfip.htm; Internet; accessed on 7 May 2009. See also , for example, Paul Butler, "Foreword: Terrorism and Utilitarianism: Lessons from, and for, Criminal Law", *The Journal of Criminal Law and Criminology*, Vol. 93, No. 1, Autumn 2002, p. 3; William H. Lewis, "The War on Terror: A Retrospective", p. 27; Arthur H. Garrison, "Terrorism: The Nature of its History", *Criminal Justice System*, Vol. 16, Issue 1, 2003, p. 40; Jackson, "Domestic Terrorism in the Islamic Legal Tradition", p. 295; Sarah Gordon and Richard Ford, "Cyberterrorism?", *Computers and Security*, Vol. 21, No. 7, 2002, pp. 637 f.; Tiefenbrun, "A Semiotic Approach to a Legal Definition of Terrorism", p. 367; Benjamin Grob-Fitzgibbon, "What is Terrorism? Redefining a Phenomenon in Time of War", *Peace and Change*, Vol. 30, No. 2, April 2005, pp. 233 f.

Second, according to the Department of State definition, terrorism is:

> "premeditated, politically motivated violence perpetrated against noncombatant targets by sub-national groups or clandestine agents, usually intended to influence an audience. The term International terrorism means terrorism involving citizens or the territory of more than one country."[294]

Third, according to the US Department of Defense, terrorism is:

> "the calculated use of violence or the threat of violence to inculcate fear; intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious or ideological."[295]

The following diagram explains the main seven elements of the definition of terrorism according to these three institutions:

| **Institution** | **FBI** | **Department of State** | **Department of Defense** |
|---|---|---|---|
| **Act** | use of force/violence | use of violence | threat/use of violence |
| **Description** | unlawful | premeditated | calculated |
| **Direct target/victim** | persons/property | non-combatants | |
| **Culprit** | | sub-national groups/clandestine agents | |
| **Intention** | intimidate/coerce | influence | inculcate fear; intended to coerce or to intimidate |
| **Indirect target/victim** | anyone | an audience=anyone | governments/societies |
| **Objective/ goal/motive** | political/social | political | political/religious/ideological |

[294] See, for example, Sharp, "The Use of Force against Terrorism", p. 38; William H. Lewis, "The War on Terror: A Retrospective", p. 27; Gordon and Ford, "Cyberterrorism?", p. 638; Garrison, "Terrorism: The Nature of its History", p. 40; Alison Elizabeth Chase, "Legal Mechanisms of the International Community and the United States Concerning State Sponsorship of Terrorism", *Virginia Journal of International Law*, Vol. 45, No. 1, Fall 2004, p. 50; Tiefenbrun, "A Semiotic Approach to a Legal Definition of Terrorism", pp. 367 f.

[295] Grob-Fitzgibbon, "What is Terrorism? Redefining a Phenomenon in Time of War", p. 233; William H. Lewis, "The War on Terror: A Retrospective", p. 27. See also Gordon and Ford, "Cyberterrorism?", p. 638.

These three definitions show certain similarities between the crime of *ḥirābah* and terrorism. In fact, *ḥirābah* satisfies most of the elements of terrorism mentioned in these definitions. The culprits' use of force, or merely the threat to use it according to the Mālikīs, is criminal, unlawful, premeditated and calculated. Their direct targets/victims are non-combatants and their possessions. The element of intimidation is a core element in the crime of *ḥirābah* and its perpetrators are even sometimes referred to as street terrorisers. The punishment of the perpetrators of *ḥirābah* who merely intimidate their victims without causing any other harm to them is exile/imprisonment, according to the majority of the jurists, or any of the following four prescribed punishments as chosen by the judge according to the Mālikīs: execution, gibbeting, amputation of a hand and a foot from opposite sides or banishment/imprisonment. This means that the mere act of intimidation is a severely punished crime under Islamic law. Although the various schools express it in different ways, the element of intimidation/coercion/influence is particularly explicit in the writings of the Mālikīs: the example given by the Mālikīs above about causing fear and intimidation to prevent people from taking a certain road indicates that causing fear and terror here is intended to achieve a certain goal. Obviously, unlike most cases of *ḥirābah*, there is no pecuniary goal here because, if the perpetrators had such goal, they would have wanted the opposite, i.e., that their indirect target/victims would use the road so that they could rob them. Thus, no matter how the intended goal in this example might be described, it parallels the acts of terrorism intended to achieve any of the four objectives named in the above three definitions, i.e., political, social, religious or ideological. But it is evident from these three definitions that "terrorism" is mainly politically motivated. The political motivations of terrorism dominate the three definitions, while the Department of State definition

restricts terrorism to politically motivated violence. Restricting terrorism to acts of violence motivated by these four objectives means that those who commit the same unlawful acts of massive indiscriminate, premeditated use of violence against innocent civilians, but for economic or other motivations, are not terrorists and therefore cannot be punished accordingly. That is to say, the current international approach to the determination of what constitutes terrorism is limited to these particular motivations rather than by the nature of the acts themselves – the indiscriminate and widespread acts of extreme violence against innocent civilians – irrespective of the motivations of the perpetrators.

Contrary to the current international approach to terrorism, the classical Muslim jurists' elaborations on what constitutes *ḥirābah* focused primarily on identifying the particular acts punishable under the law concerning this crime and the context in which it occurs. Apart from robbing their victims, killing innocent civilians, causing bodily damage or injuries, or the mere act of intimidating the victims without committing any of the above, all these acts punishable under the law of *ḥirābah* represent the classical Muslim jurists' primitive equivalent of present-day terrorism. But more than these acts, the contexts in which the core elements of these acts of *ḥirābah* occur remarkably describe the nature of present-day terrorist acts. In both *ḥirābah* and terrorism, the culprits target innocent civilians who have committed no wrongdoing against them. Although both the perpetrators of *ḥirābah* and present-day terrorists possess some force, in terms of the weapons they use or the number of their groups, they attack their victims in an underhand way. They both remain clandestine groups of terrorisers, who attack their innocent civilian victims in situations where they are in no position to defend themselves. Furthermore, and more importantly, the victims of *ḥirābah* and present-day terrorism are attacked in a

context in which (*lā yalḥaquhum al-ghawth*) they are helpless. This element of helplessness – a core element in *ḥirābah* – brings to mind the situation of the victims of present-day terrorist explosions: whether the victims are travelling through the desert or unpopulated areas, as during the classical Muslim jurists' era, or, as happens today, on board a plane, train, bus, etc., walking on the streets or even sitting in their homes, victims are attacked or blown up in situations where they are defenceless and helpless in the face of the armed attackers and hidden explosives.

Therefore, it may be concluded here that the answer to the sixth question is in the affirmative – classical Muslim jurists did treat terrorism as it was practised in their own times. The forms, acts and motives of terrorism then differed considerably from those of the present-day, but the nature and core elements of terrorism, at least according to the above three definitions, show striking similarities between *ḥirābah* and today's terrorism. However, the classical Muslim jurists' discussions of the punishment for *ḥirābah* reveal that they limit this *ḥadd* punishment to such terrorist actions, whether domestic or international, in which both the perpetrators and victims are Muslims or *dhimmis*. The four schools of Islamic law agree that this must be the case in order for the perpetrators to be punished for their actions under Islamic law. The Ḥanafīs stipulate further that such terrorist acts must occur within the territorial jurisdiction of the Islamic state, while the Shāfiʿīs, Mālikīs, Ḥanbalīs and Ẓāhirīs punish the culprits even if the crime occurs outside the territorial jurisdiction of the Islamic state as long as both the criminals and victims are Muslims or *dhimmis*. Certainly, this does not mean that such terrorist actions which fall outside of the *ḥirābah* punishment are not prohibited, but merely means that these Qur'ān-prescribed punishments are inapplicable if these particular conditions are not fulfilled. Ibn Mawdūd states that if a Muslim enters *dār al-ḥarb* with an *amān*, then it

is prohibited for him to do any harm to their person or property, because this will be a treason which is prohibited in Islam.[296]

The answer to the seventh question set at the beginning of this chapter, on what constitutes acts of terrorism in Islam is, in contrast to the current international attempts to define what constitutes terrorism, clear and precise and almost agreed upon by Muslim jurists. The main reason for this clarity and agreement is that, as referred to above, classical and modern Muslim jurists determined what constituted the terrorism of their time by enumerating the acts committed against the victims of terrorism and the contexts in which these acts occurred.[297] Moreover, it is also clear that the punishment of the culprits of each of these terrorist acts is commensurate to the criminal acts committed, according to the majority of jurists, or, according to the Mālikīs, based on the intellectual and physical abilities of the culprits. The answer to the seventh question can therefore be found in the answer to the eighth question, about the punishment of terrorists and their accomplices. In other words, the answer to the seventh and eighth questions posed at the beginning of this chapter, on what constitute acts of terrorism and the punishment of terrorists and their accomplices in Islamic law, can be found in the rules for the punishment for *ḥirābah*, discussed above. It is worth recalling here that in addition to the specific acts enumerated by the classical Muslim jurists, some modern Muslim scholars have added certain

[296] Ibn Mawdūd, *Al-Ikhtiyār*, Vol. 4, p. 144.

[297] It is interesting to add here that modern Muslim scholars follow the same approach of their classical predecessors in defining what constitutes terrorism: They define what terrorism is by mentioning the acts committed by the terrorists against their victims. According to The Islamic Fiqh Council definition of terrorism, as given in English in the appendix of Issue 17 of *The Islamic Fiqh Council Journal*, "Terrorism is an atrocity committed by individuals, groups or states against the human being (his religion, life, mind, property and honour). It includes all forms of intimidation, harming, threatening and killing without a just cause and all acts of banditry and violence that take place in the wake of an individual or collective criminal plan aimed at spreading the terror among people by exposing their life, liberty or security to danger, including the harm inflicted to the environment or to a public or private utility, or exposing one of the national or natural resources to danger." The Islamic Fiqh Council, "Resolutions of the Islamic Fiqh Council", *The Islamic Fiqh Council Journal*, Issue No. 17, 2004/1425, p. 34.

modern actions which also constitute this crime, such as abduction, sabotage, organized crime, drug trafficking, terrorist explosions and the hijacking of planes, trains, etc.

### 5.4 Conclusion

The law of rebellion in Islam shows that the classical Muslim jurists successfully managed to cautiously develop a legal framework to fulfil the difficult task of safeguarding both the Islamic obligation to apply Islamic law and achieve justice on the one hand, and to maintain stability and security on the other. The current failure to achieve this at present is one of the reasons for the instability and backwardness of a large part of the modern Muslim world. The law of rebellion in Islam produces a framework that regulates the relationship between the regime governing the Islamic state and its internal opponents. As shown above, this framework takes into consideration the balance between the obligations to apply the rule of Islamic law and to prevent bloodshed among Muslims. Once the three conditions discussed above are fulfilled in a group of rebels, it is an indication that they may have a just cause that the regime must deal with in accordance with the framework guaranteed for them in Islam. This framework obligates the regime to engage in discussions with its opponents and address their complaints, which indicates the necessity of resolving potential conflicts peacefully.[298] But more significantly here, the proposal by some classical Muslim jurists that a *munāẓarah* (a public debate) should be held between the regime and the would-be rebels if all attempts to convince the latter to abandon their plans to use force fail, is an extremely generous one and surpasses what any

[298] It is worth adding here that the Egyptian terrorist group know as *al-Jamāʿah al-Islāmiyyah* gave up, and renounced, their use of violence, in a number of publications following a series of fifteen attempts of discussions over a decade and a half between the leaders of this group and Egyptian government officials, religious scholars and police officers, see El-Awa, *Al-Jamāʿah al-Islāmiyyah*.

democratic government at present can offer to its would-be rebels. Indeed, this last attempt to avoid civil war in Islam by inviting the public to judge who is right and who is wrong between the regime and the would-be rebels is similar to the debates between presidential candidates in modern democracies. Moreover, the public was supposed to judge on the basis of that debate without resorting to the polls; a method any classical Muslim jurists would have found practically convenient and would have strongly recommended in such situations.[299] That is to conclude that the classical Muslim jurists offered the political opponents of the regime a remarkable degree of tolerance[300] and developed at least a theoretical framework to ensure peaceful and democratic conflict resolution.

Despite the fact that a few Muslim countries claim to have adopted a wholly Islamic system of law, while the others have adopted an amalgam of Islamic and Western laws, not a single Muslim country appears to apply the Islamic law of rebellion.[301] Understandably, any regime in the Muslim world at present would find this law, in the form in which it was developed by the classical Muslim jurists, too lenient to the extent of even encouraging their political opponents to resort to armed rebellion to overthrow them. But the degree of freedom granted to political opponents in many Muslim countries to challenge the tyranny and policies of their regimes at present cannot be compared to what the classical Muslim jurists endeavoured to guarantee for them,[302] particularly with respect to the law of

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[299] Al-Qaraḍāwī advises contemporary Muslims here that they should utilize the peaceful democratic methods of change which prevent *fitnah* and destruction, see al-Qaraḍāwī, *Fiqh al-Jihād*, Vol. 2, p. 1067.
[300] See Abou El Fadl, “Islam and the Theology of Power”, p. 30.
[301] See Abou El Fadl, “Political Crime in Islamic Jurisprudence”, p. 27; Abou El Fadl, *Rebellion and Violence*, p. 337.
[302] It is worth adding here, in the words of Lisa Wedeen, that: “A fundamental concern of many contemporary Muslims is the need to check the arbitrary powers of leaders and institute the rule of law, and strict application of the sharia is seen by many as a way of checking tyranny while ensuring procedural justice”, Wedeen, “Beyond the Crusades: Why Huntington, and bin Ladin, are Wrong”, p. 58.

rebellion. Criticising rulers, whether presidents or ruling families/kings, of certain Muslim countries at present leads to jail. It is a punishable crime in some Muslim countries to insult "the royal entity" or even specific institutions such as the army and the judiciary.[303] Such criminal offences would seem to be unimaginable for the classical Muslim jurists. If "insulting" in itself, were a criminal offence, then there is no need for, nor Islamic grounds that would warrant, laws that punish those who insult particular individuals or institutions differently from those who insult other members of society.

The second major contribution that Islamic law can make not only to present Muslim societies but also to the international society at large lies in the treatment of terrorism. Specifically here, because the classical Muslim jurists' approach to the determination of what constitutes terrorism can be a useful approach to defining what terrorism is – a task the world has failed so far to complete. The punishment of the perpetrators and accomplices of terrorism is the severest punishment stipulated under Islamic law, partly because it endangers the security, economy and stability of the entire society; it is not merely an attack on the lives and property of the individual victims alone. The punishment of terrorists in Islam is therefore classified as God's right because any citizen of a society – and indeed the entire society – can be a

[303] For example, in June 2006, according to the BBC: "Two Egyptian journalists have been sentenced to a year's imprisonment for defaming President Hosni Mubarak", BBC, "Egypt journalists get jail terms", available from http://news.bbc.co.uk/1/hi/world/middle_east/5118876.stm; Internet; accessed 26 May 2009; Also In Kuwait in April 2009: "a candidate standing in the parliamentary election has been arrested for publically criticising the ruling al-Sabah family", BBC, "Kuwait 'Arrests critic of Sabah'", available from http://news.bbc.co.uk/1/hi/world/middle_east/8008589.stm; Internet; accessed 25 May 2009. In October 2006: "A military court in Egypt has jailed a nephew of the assassinated President Anwar Sadat on charges of insulting the army and spreading disinformation", BBC, "Sadat's nephew receives jail term", available from http://news.bbc.co.uk/1/hi/world/middle_east/6104214.stm; Internet; accessed 26 May 2009. Also, in Turkey, according to the words of a French ambassador to Turkey from 1988 to 192: "Any public criticism of the military (in the press, for example) found to be 'insulting' can result in prison sentences of up to six years", Eric Rouleau, "Turkey's Dream of Democracy", *Foreign Affairs*, Vol. 79, No. 6, November/December 2000, p. 107.

victim of their actions, which cause *ikhāfah* (intimidation), *fasād* (destruction) and *ʿadam ghawth* (helplessness).

But since the concept of what constitutes a society and its national security in today's globalized world changes – and the Muslim world is no exception to this – laws and legal doctrines should change in order to address these changes, particularly since classical Muslim jurists lived under a unified Islamic state, unlike today's world where one third of Muslims live as minorities in the non-Muslim world. In addition, in the current changed, globalized and inter-dependent world, a classical Muslim jurist would have found that the *maṣlaḥah* (public interest) of the Muslim world now requires a universally accepted legal definition and a universal treaty tackling the common challenge of terrorism because the security of Muslims and their protection from the danger of terrorism is also globalized, like their current international society. It is therefore no wonder, on the one hand, that the Islamic Fiqh Council's definition of terrorism omits any mention of the religion or nationality of the culprits and victims of terrorism or the territory in which the terrorist acts occur. This definition states that: "Terrorism is an atrocity committed by individuals, groups or states against the human being…"[304] This definition contradicts the classical Muslim jurists' approach which restricts the punishment for *ḥirābah* to crimes in which both the culprits and the victims are Muslims or *dhimmis*, as explained above.

On the other hand, it is not surprising either that, in stark contradiction to the theory of the clash of civilizations between Islam and the West, David Miliband, the British Foreign Secretary, has recently called for a coalition between the West and the Muslim world. On 21 May 2009, in a speech at the Oxford Centre for Islamic Studies, he argued for building coalitions "to pursue common interests" of

[304] The Islamic Fiqh Council, "Resolutions of the Islamic Fiqh Council", p. 34.

maintaining security and facing “the threats from climate change, terrorism, pandemics and financial crisis.”[305] Such wise foreign policies aimed at the maintenance of international peace must be based on, and accompanied by, a just and equitable international legal system fee from the pressures and control of the big powers. In conclusion, the maintenance of international peace requires the establishment of justice, which necessitates an ever developing international legal system with a mechanism that ensures the application of international law and the punishment of its violators.

[305] David Miliband, “Our Shared Future: Building Coalitions and Winning Consent”, available for http://www.fco.gov.uk/en/newsroom/latest-news/?view=Speech&id=18130489; Internet; accessed 29 May 2009.

# CONCLUSION

This study has shown that the Islamic law of war has been interpreted and developed throughout its history by independent individual Muslim jurist-scholars. A few of them have indeed shaped this centuries-long process of interpretation, reasoning, disagreement over, and application of jihād in the changing world that has been the context in which this process has taken place. It is only these few individuals who have made genuine attempts and offered explanations of the nature and objectives of jihād based on their interpretations of the Qur'ān and the tradition of the Prophet, the primary sources of Islamic legislation. No less importantly, even fewer individuals have addressed the issue of the application of jihād in differing world situations and have not merely related and discussed earlier opinions. These individuals are the sort of scholars who have both the courage to challenge and reinterpret accepted opinions and deep insight into both the sources of Islam and the realm of its application. This shows that the Islamic law of war throughout its history has been a living entity that has attempted to achieve certain objectives (Islamic *jus ad bellum*) and which has been regulated by certain rules (Islamic *jus in bello*).

In the process of the formulation of the Islamic law of war, disagreements and varying interpretations become inevitable since this is a characteristic of any human endeavour. Recognizing this simple human fact about such a human endeavour is not difficult. But since this human endeavour is related in this case to a law that is derived partly from religious sources, many insiders and outsiders have ignored this simple fact and thus have assumed the opposite and, in fact, have not only overlooked but have even strongly denied that achieving the objectives of jihād takes different forms in different situations. Thus, to answer one of the core questions of this study about the nature of jihād, this study has shown that the examination of

the incidents of war between the Muslims and their enemies during the Prophet's lifetime, the Qur'ānic justifications for war and the opinions of the majority of classical and modern Muslim jurists and scholars, confirms that jihād is a defensive war. It is justified in cases of aggression against the Muslim nation and *fitnah*, i.e., the persecution of Muslims. These two justifications indicate that jihād is a just war which aims at stopping aggression or protecting the religious freedom of Muslims. The fact that these two justifications for jihād in the sense of armed conflict are derived from the teachings of a religion does not render jihād a "holy war", unless the term "holy" refers to any activity based on religious justifications, including defensive war.

This kind of defensive war is called *jihād al-dafʿ* which is a *farḍ ʿayn* (personal duty of every capable person). But the main reason for the confusion and controversies about the nature of jihād is that the same word is used for another kind of jihād called *jihād al-ṭalab* (military campaigns to convey the message of Islam in non-Muslim territories). *Jihād al-ṭalab* does not necessarily involve armed confrontations. This kind of jihād refers to the campaigns initiated by the Islamic state after the Prophet's demise in the first century of the Islamic era, known as *al-futuḥāt al-Islāmiyyah* (the Islamic openings). According to the rules of this kind of jihād, Islam is to be offered to non-Muslims; if they reject it, a form of agreement is to be concluded by which they pay *jizyah* to the Islamic state in return for the protection the Islamic state provides for them against any foreign aggression. If they reject these two options, armed confrontation becomes the third. Jurists explain that the Islamic state should undertake this kind of jihād at least once a year if it has the capability to do so. Importantly, Muslim jurists agree that the aim of resorting to this kind of militarized missionary campaigns was to convey the message of Islam to

non-Muslims. Thus, the Islamic state resorted to this kind of preaching because the freedom to preach Islam in non-Muslim territories was not secured at that time. Shaykh Yūsuf al-Qaraḍāwī explains that the Islamic state resorted to this kind of jihād "in order to break down the barriers", i.e., the non-Muslim regimes, preventing people from listening to the message of Islam.[1]

This kind of militarized missionary activity has become unnecessary because there are today no such barriers preventing Muslim preachers from entering non-Muslim territories to preach Islam. Moreover, Muslims can now preach Islam to non-Muslims without physically travelling to non-Muslim territories. This is why most modern Muslim scholars agree that, in addition to defensive war to stop aggression and to liberate Muslim occupied territories, jihād at present takes the form of preaching Islam using the Internet, the mass media, written publications and other such missionary methods. It is remarkable that, despite the fact that preaching Islam is so important that the Islamic state was supposed to resort to war if needs be to fulfil this task, no Muslim country at present appears to meet the objective of this kind of jihād, i.e., preaching Islam.

This shows that determining the nature of jihād depends on which kind of jihād is being considered and which period in history is being studied. *Jihād al-daf'* is simply a defensive war, while *jihād al-ṭalab* at the present time means missionary activities. Thus, at present, jihād in the sense of armed conflict refers to a defensive just war justified in cases of aggression and persecution of Muslims. This applies to jihād in both international and domestic armed conflicts alike, whether jihād in international armed conflicts refers to war against non-Muslim territories according to the classical Islamic conception of the state system, or to conflicts with another

[1] Yūsuf al-Qaraḍāwī, *Fiqh al-Jihād: Dirāsah Muqāranah li-Aḥkāmih wa Falsafatih fī Ḍaw' al-Qur'ān wa al-Sunnah* (Cairo: Maktabah Wahbah, 2009), Vol. 1, pp. 54 f.

Muslim country according to the modern nation-state system. The other key justification for jihād in domestic armed conflicts is the violations of the rules of the sharīʿah. That is, apart from cases of aggression against Muslims, resorting to war has been justified in order to preach Islam, if needs be, during certain periods in history, or to stop the religious persecution of Muslims, or to prevent the violation of the sharīʿah in Muslim countries, thus indicating that the justification for war in Islam has evolved around protecting the freedom to practice, apply and preach Islam.

These particular justifications may give an indication of some of the situations that may justify the use of force, from an Islamic perspective, in the future. Indeed, these justifications explain the fact that recent incidents of, or calls for, the use of force by Muslims have been targeting regimes in Muslim countries mainly because of the total or partial absence of the application of the sharīʿah, or merely the violation of its rules. That is to say, internal hostilities or acts of terrorism targeting regimes in Muslim countries, i.e., "jihād against the near enemy", may be a dominant kind of use of force by Muslims, apart from the liberation of occupied territories. This points to the need for Muslim countries to tackle this issue, which may cause unrest in their societies. The current acts of violence associated with Islamist groups demanding the application of the sharīʿah in Gaza,[2] Pakistan, Nigeria and Somalia are cases in point.

Concerning the preaching of Islam, it seems inconceivable that Muslims at the present time may think of it, much less the application of the sharīʿah in a non-Muslim country, as a justification for the use of force against non-Muslim countries. Indeed, the freedom to practise Islam is more secure in some non-Muslim countries than in a few Muslim countries. All these new realities are reasons for the

[2] Shahdī al-Kāshif, "Maqtal Zaʿīm al-Salafiyyah al-Jihādiyyah", available from http://www.bbc.co.uk/arabic/middleeast/2009/08/090814_mr_gaza_imarah_tc2.shtml; Internet; accessed 15 August 2009.

phenomenon called “jihād against the near enemy”. This is in line with the opinion of the majority of classical Muslim jurists that unbelief in itself is not a justification for going to war, but only the aggression of non-Muslims against Muslims and their hostility towards the preaching of Islam. It is these justifications that determine the Muslims’ recourse to jihād, and whether a war is to be waged or not, and who is the enemy, is determined accordingly.

As referred to above, Islamic law treats numerous aspects of human activity, including acts of worship, family law, financial transactions, international relations, etc. A common and major mistake in this regard is to assume that, since Islam treats these aspects, all of its rules are unchangeable. Some of the rules are intended to achieve certain objectives and thus they change with changing of situations in order to achieve the same objectives, as shown above in the case of jihād. In addition, the fulfilment of *maṣlaḥah* (public interest) is one of the objectives of the law.[3] The confusion between sharīʿah and *fiqh*, discussed in Chapter Three, which has led to the common error in Western literature of labelling Islamic laws as sacred and unchangeable sharīʿah, i.e., divine law, has complicated the study of many fields related to the study of Islam, simply because the opinions and rules given by a given Muslim jurist or scholar are presented as permanent laws of Islam, i.e., sharīʿah.

This study has shown the wide range of disagreements among Muslim exegetes and jurists both in the interpretations of Islamic sources and, as a consequence, in the laws advocated in consequence. Thus, Chapter Four, in particular, has indicated that a key characteristic of Islamic law is the disagreements and contradictory rules advocated by classical Muslim jurists. In the process of

[3] According to David De Santillana, Islamic law “divine in its origin, human in its subject-matter, has no other end but the welfare of man [or what he calls the public weal [*maṣlaḥa*].” David De Santillana, “Law and Society”, in Thomas Arnold and Alfred Guillaume, eds., *The Legacy of Islam* (Oxford: Clarendon Press, 1931), p. 290.

formulating the Islamic rules regulating the conduct of Muslims during international armed conflict, independent, individual Muslim jurist scholars have interpreted the Islamic sources and, on the one hand, attempted to infer the intention that lies behind them, and, on the other, tried to discover how the military necessity of winning the war, i.e., the *maṣlaḥah*, may be accomplished. The conflicting rules advocated by the many jurists of the various schools of Islamic law necessitate, first, the continuous exercise of collective *ijtihād* and, second, a codification of Islamic rulings, if Islamic law is to be applied in differing situations or feasibly and fairly judged.

Put differently, in terms of the application, what would a Muslim army or a group of fighters, who are hypothetically supposed to abide by the Islamic *jus in bello* norms, do when faced by the contradictory rulings advocated by the jurists regarding, for example, the permissibility of the use of certain weapons, attacking the enemy by night, or using non-combatant individuals as human shields? It stands to reason that particular rulings would be chosen, since it is irrational, and even practically impossible, that a regular state army, or even an organized group of fighters, would be left to adopt contradictory rulings regulating their actions in war. Moreover, because of the absence of a codification of Islamic rulings, some terrorist Muslim groups have justified the indiscriminate killing of innocent Muslim and non-Muslim civilians by drawing an analogy with the case of *tatarrus*, human shields. Such misinterpretation of the classical Muslim jurists' treatment of this issue could have been prevented if there were a codification of Islamic rulings on the subject drawn up in accordance with the consensus of an international body of Muslim jurists. Furthermore, such a codification would be able fairly to represent Islamic law and thus minimise the possibility of Islam being selectively presented in ways that are often described as either apologetic or prejudiced.

In fact, the main finding of this study, unexpectedly however, is the enormous contribution that the Islamic law of war, jihād, may make towards international peace and security in the modern world, particularly if such a codification were accomplished. Concerning the justifications for war in international armed conflicts, the agreement of classical and modern Muslim jurists and scholars that jihād is justified only in cases of aggression against, and persecution of, Muslims, *jihād al-dafʹ*, indicates that Muslims are prohibited from waging war for other reasons. More importantly here, it indicates that Muslim countries at present are, indeed, obliged, according to the Qur'ānic prescription (4:75-76), to go to war to rescue oppressed Muslims – an obligation al-Qaraḍāwī also extends to oppressed non-Muslim minorities in the light of this text. It is worth adding here that this obligation *a fortiori* extends to include oppressed Muslims living in Muslim countries.

One of the objectives even of the first/seventh century *al-futuḥāt al-Islāmiyyah*, according to prominent Muslim scholars such as Abū Zahrah and al-Zuḥaylī, was the liberation of non-Muslim peoples from the oppression of the Romans and the Persians.[4] According to this logic, Muslims are obliged to go to war if they have the capability of rescuing oppressed non-Muslim peoples. Theoretically, this would impose a religiously binding obligation on Muslim countries to participate in the efforts of the international society to stop massacres and genocides, even if the victims are non-Muslims.

Concerning the justifications for going to war in non-international armed conflicts, the Qur'ānic prescription (49:9) that justifies the use of force to stop inter-

[4] Muḥammad Abū Zahrah, *Al-ʹAlāqāt al-Dawliyyah fī al-Islām* (Cairo: Al-Dār al-Qawmiyyah lil-Ṭibāʿah wa al-Nashr, 1964/1384), p. 32; Wahbah al-Zuḥaylī, "Islam and International Law", *International Review of the Red Cross*, Vol. 87, No. 858, June 2005, pp. 279 f.; Wahbah al-Zuḥaylī, *Al-ʹAlāqāt al-Dawliyyah fī al-Islam: Muqāranah bi-al-Qānūn al-Dawlī al-Ḥadīth* (Beirut: Mu'assasah al-Risālah, 1981/1401), pp. 127-129. See also Hilmi M. Zawati, *Is Jihad a Just War? War, Peace, and Human Rights under Islamic and Public International Law*, Studies in Religion and Society, Vol. 53 (Lewiston, NY: Edwin Mellen Press, 2001), p. 49.

Muslim fighting and bring about reconciliation between the warring parties places modern-day Muslim countries under a religious obligation to participate in putting an end to such conflicts. The severe restrictions laid down by classical Muslim jurists on the violent overthrow of established Muslim regimes may have contributed to saving Muslims throughout history from the scourge of civil wars, but at the same time they did not propose a practical Islamic mechanism for changing regimes by peaceful means or for deciding who should be in charge of such a mechanism, although they did provide a possibility for change of regime in a peculiar case referred to below. The problem here is that this cautious position of the classical Muslim jurists may be abused to support contemporary corrupt and tyrannical regimes, although their treatment of the regulations for the use of force against rebels attempts to avoid this problem – but only once an act of armed rebellion is about to take place.

Concerning the contribution the Islamic regulations for war in international armed conflicts can make in the modern world, it must first be said that the mere fact that these rules are self-imposed indicates the great influence they may have on the conduct of Muslims in war. Chapter Four indicates that the overarching concern of the classical Muslim jurists' exhaustive treatment of the Islamic rules regulating the conduct of Muslims in international armed conflicts was to protect the lives of enemy non-combatants. They developed a full-blown doctrine of non-combatant immunity and thus have weighed the prohibition on the indiscriminate killing of enemy non-combatants, even sometimes as collateral damage, against the military necessity of winning the war, as is evidenced from their discussions of the issues of human shields, night attacks and certain kinds of primitive indiscriminate weapons. The nuanced restrictions, and in some cases prohibition, of the use of primitive indiscriminate weapons (namely, mangonels, fire and flooding) advocated by

classical Muslim jurists are the basis on which modern Muslim scholars advocate the Islamic prohibition of the possession of WMD. However, the enemy's possession/use of such indiscriminate weapons – whether ancient or modern – has been advocated by Muslims as a justification for the possession/use of these weapons on the basis of the principle of reciprocity. This Islamic position shows the need for reaching a global agreement on the prohibition of the possession of WMD by any member of the international society based on the fact that the possession of these weapons by some members may lead others to attempt to possess it.

Some contemporary scholars have concluded that the Islamic rules governing the conduct of Muslims in war "In many respects… actually supersede[s] the Geneva Convention."[5] In the words of Saleem Marsoof, Judge in the Sri Lankan Court of Appeal, these rules are "more elaborate and just than even the rules contained in modern international conventions and protocols containing the principles of the modern International Humanitarian Law".[6] The potential contribution these humane Islamic *jus in bello* norms could provide to the international society's efforts to humanize international armed conflicts would undoubtedly have been greater if modern Muslim scholars had addressed the same concerns as their classical predecessors in the light of the modern war situations. Indeed, the inadequate utilization of the Islamic potential contribution to the international system, which has been noted by some scholars,[7] is due to the fact that, first, Islamic scholars, unlike their classical predecessors, no longer show adequate concern to address contemporary issues, particularly regarding Islamic governance, criminal law and

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[5] Troy S. Thomas, "Prisoners of War in Islam: A Legal Inquiry", *The Muslim World*, Vol. LXXXVII, No. 1, January, 1997, p. 52.
[6] Saleem Marsoof, "Islam and International Humanitarian Law", *Sri Lanka Journal of International Law*, Vol. 15, 2003, p. 27.
[7] Muhammed Muqtedar Khan, "Islam as an Ethical Tradition of International Relations", in Abdul Aziz Said, Nathan C. Funk and Ayse S. Kadayifci, eds., *Peace and Conflict Resolution in Islam* (Lanham MD: University Press of America, 2001), p. 73.

international law. The legal systems covering these areas in most Muslim countries have been replaced by Western legal systems.

Second, the state domination of religious institutions has weakened public trust in some state-salaried Islamic scholars, which in turn has contributed to the emergence of a host of fundamentalist groups who have their own extreme interpretations and applications of Islam. This situation has proved to be catastrophic. To mention just a few examples of relevance here, recent acts of terrorism committed by Muslims indiscriminately killing innocent civilians, Muslims and non-Muslims alike, violate the absolute Islamic prohibition of targeting any enemy non-combatants, including women, children, the aged, the clergy, etc., let alone the prohibition on imperilling the lives of civilians even during war operations. Furthermore, even if such acts are aimed at military targets, the prohibition still applies because the use of force in Islam must take place under the legitimate authority.

As for the contribution the Islamic regulations for war may make in domestic armed conflicts, the Islamic law of rebellion provides a framework that can serve as a good mechanism for resolving internal conflicts peacefully, democratically and through negotiation. It ensures that the dictates of the sharīʿah are not violated and gives the people the right to put an end to injustice and oppression on the part of the ruling regime, even if they have to resort to armed rebellion, but only after peaceful attempts to address and satisfy the rebels' complaints and demands have failed. Interestingly and unexpectedly, the Islamic law of rebellion shows a remarkable degree of tolerance for the internal opponents of an Islamic state, recognising the causes that may drive them to armed rebellion. This degree of tolerance for and recognition of opponents of the state is secured only after they fulfil three conditions

whose objectives are, first, to ensure that there is potentially a valid case for a just resort to the use of force against the state and, second, not to give a blank check to any individual or a group of individuals to resort to violence. It is ironic that classical Muslim jurists provided this well-developed framework, which secures this degree of tolerance for opponents of the Islamic state and gives them the right to challenge and change the regime only when they are about to resort to armed rebellion. In other words, it is surprising that the Islamic mechanism for a form of democracy and a change of regime is provided in the Islamic law of rebellion. In fact, this is a result of the pragmatic and cautious attitude of the majority of classical jurists, which in most cases gives priority to the prevention of the shedding of blood among the Muslims over the maintenance of justice and the rights of citizens.

Regarding the Islamic treatment of terrorism, the classical Muslim jurists' approach, which defines *ḥirābah*/terrorism according to the specific acts and the contexts in which they are perpetrated, may be a useful approach for achieving a universally accepted legal definition of terrorism, which is necessary if the international community is determined to fight this phenomenon irrespective of who its perpetrators and victims are. The severest punishment provided under Islamic law for the perpetrators of and accomplices in acts of terrorism is a reflection of the danger this phenomenon poses to the security and economy of society as a whole. The recent acts of terrorism perpetrated by Muslims in some non-Muslim countries appear to be generally unthinkable to classical Muslim jurists, even if committed against citizens of enemy states and during war operations. Jurists have secured total protection for the person and property, even of enemy combatants under the *amān* system if they enter the Islamic state and do not commit acts of hostility. Likewise, jurists explain that it is prohibited for Muslims to commit any acts of aggression

inside enemy territories because this is a violation of the *amān* contract – the equivalent of today's visa system – they were given. In addition, all acts of force that endanger the lives of enemy non-combatants or cause the destruction of their property during war operations are strictly regulated and are prohibited in most cases under Islamic law, although some jurists allow for the inevitability of collateral damage in cases of military necessity or reciprocity. Furthermore, taking the lives of animals unjustly, i.e., not for food, and torturing or slaughtering them inhumanely, is prohibited in Islamic law. It is worth recalling here al-Shāfiʿī and Ibn Ḥazm's prohibition of inflicting damage on animate creatures owned by the enemy during war operations, which is explained, according to al-Shāfiʿī, by the fact that, unlike lifeless property, living creatures feel pain and any harm done to them will be tantamount to torture, which is prohibited in Islam.[8] This Islamic prohibition of, and severest punishment for, terrorism should serve as a counter terrorism approach, particularly if Muslim terrorists claim that their actions are Islamically justifiable. The term "Islamic terrorism" is thus a misnomer.

In conclusion, this study of all the various forms of the use of force in both international and domestic armed conflicts establishes that the Islamic law of war prohibited the resort to violence except in defence against aggression and to defend the religious freedom of Muslims, and, in domestic armed conflicts, to achieve the rule of the sharīʿah. The restrictions placed on the conduct of war indicate the sanctity of protecting the lives of enemy non-combatants, their property and the environment. These restrictions on the resort to, and conduct in, war aimed at, and in fact should achieve, the saving and protection of human lives and religious freedom and the prevention, or in case of a justified war alleviation, of the scourge of war.

[8] Muḥammad ibn Idrīs al-Shāfiʿī, *Al-Umm*, 2nd ed. (Beirut: Dār al-Maʿrifah, [1973]/1393),Vol. 4, pp. 259, 287; ʿAlī ibn Aḥmad ibn Saʿīd ibn Ḥazm, *Al-Muḥallā* (Beirut: Dār al-Āfāq al-Jadīdah, n.d.), Vol. 7, pp. 294-296.

This conclusion is the result of the examination of the literature – i.e., the theory put forward by Muslims – studied here, but whether or not the practice of Muslims throughout history corresponds with it requires further study. In fact, there is a bad need for a study of the Islamic legal-ethical treatment of the current use of violence by Muslims in both domestic and international conflicts.

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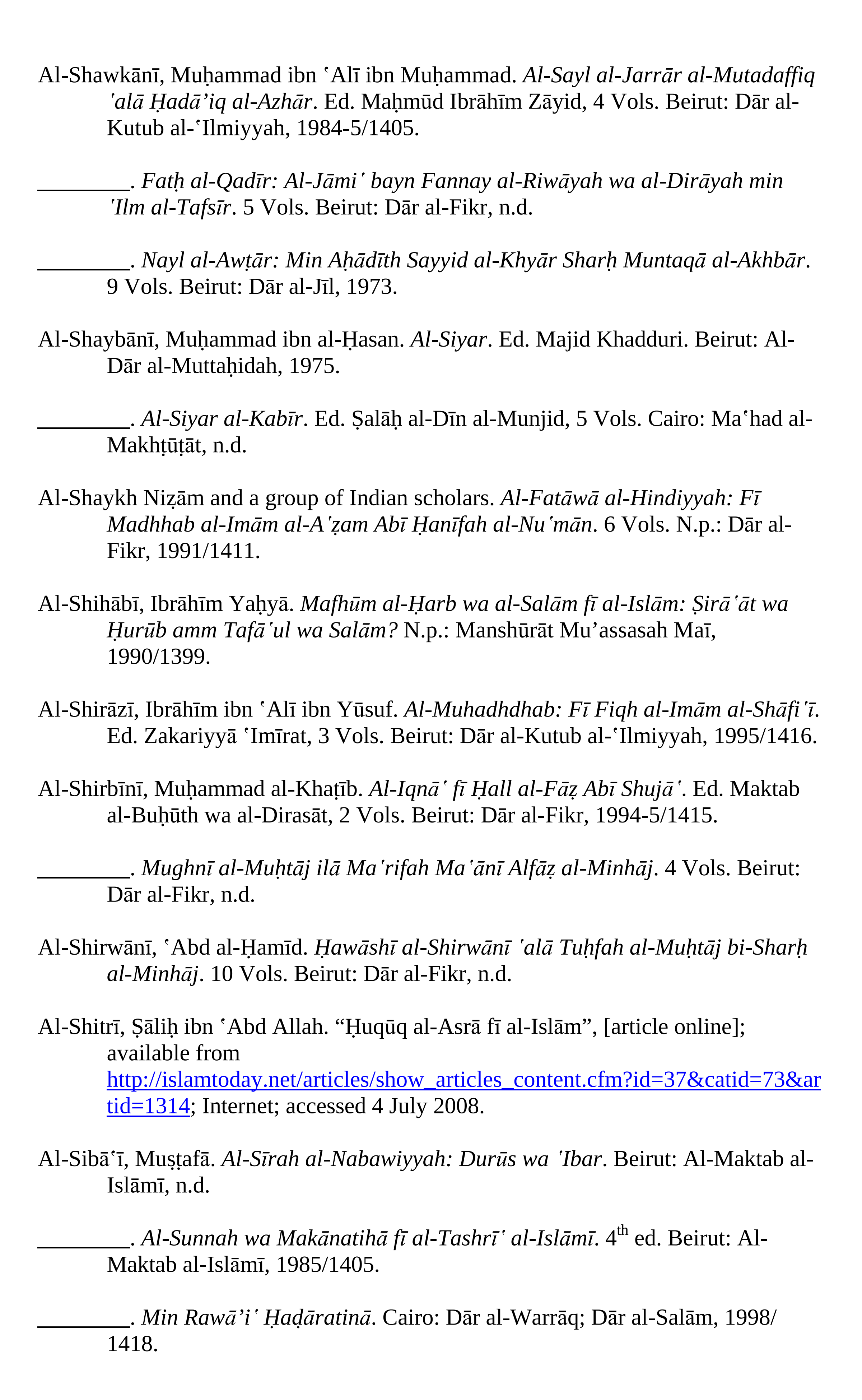


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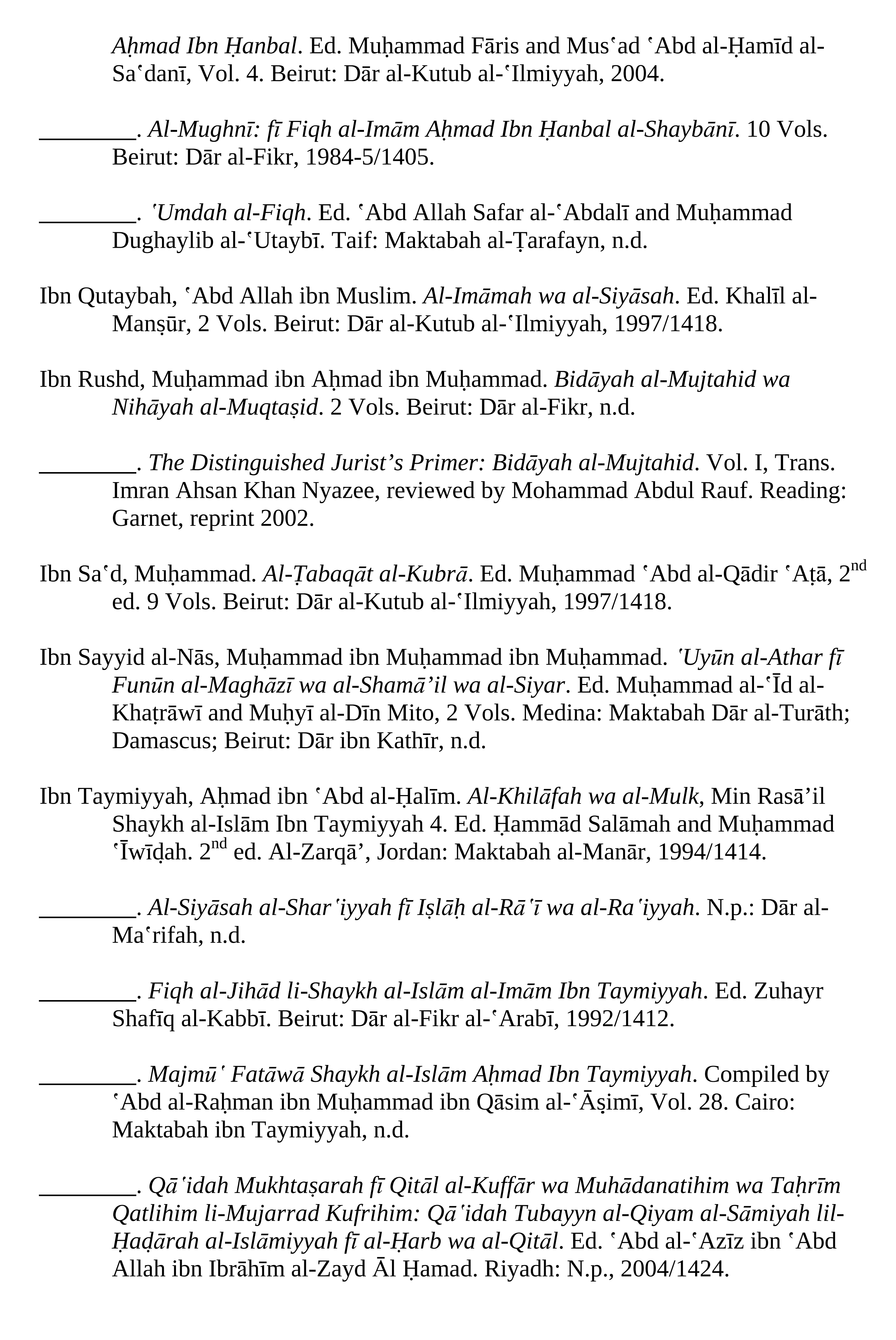
[1] (d. 884/1479-80)
[2] (d. 762/1360-1)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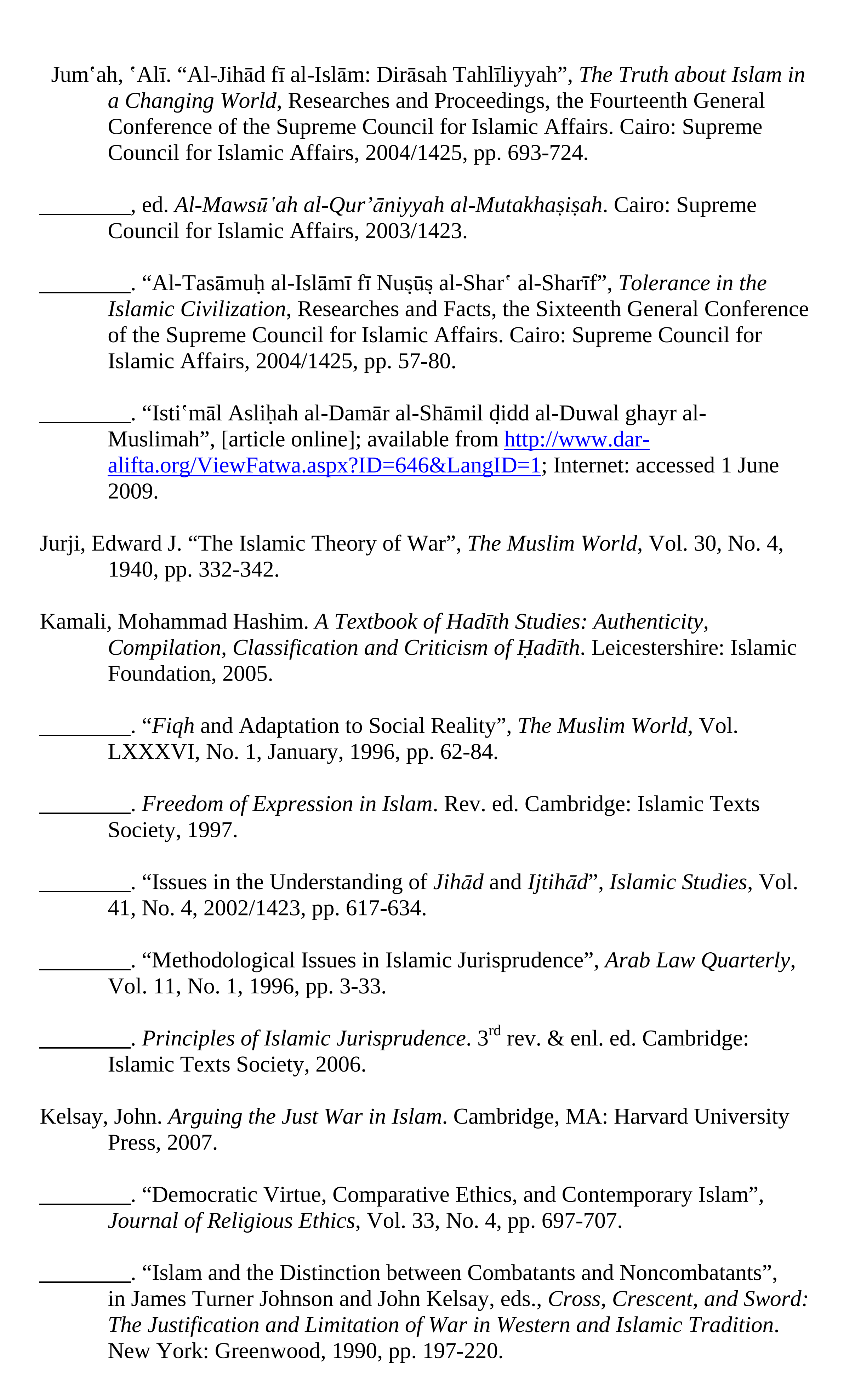


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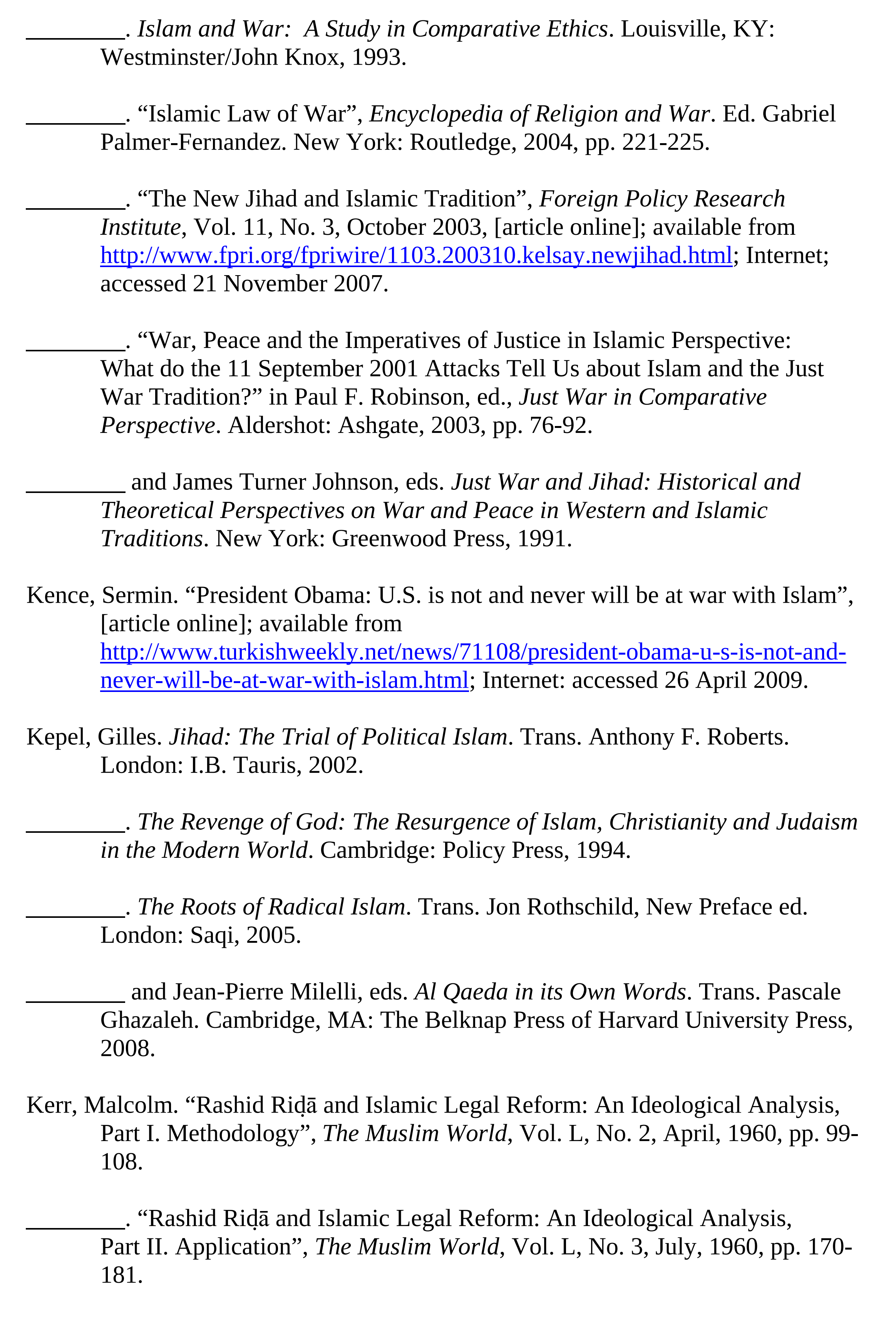

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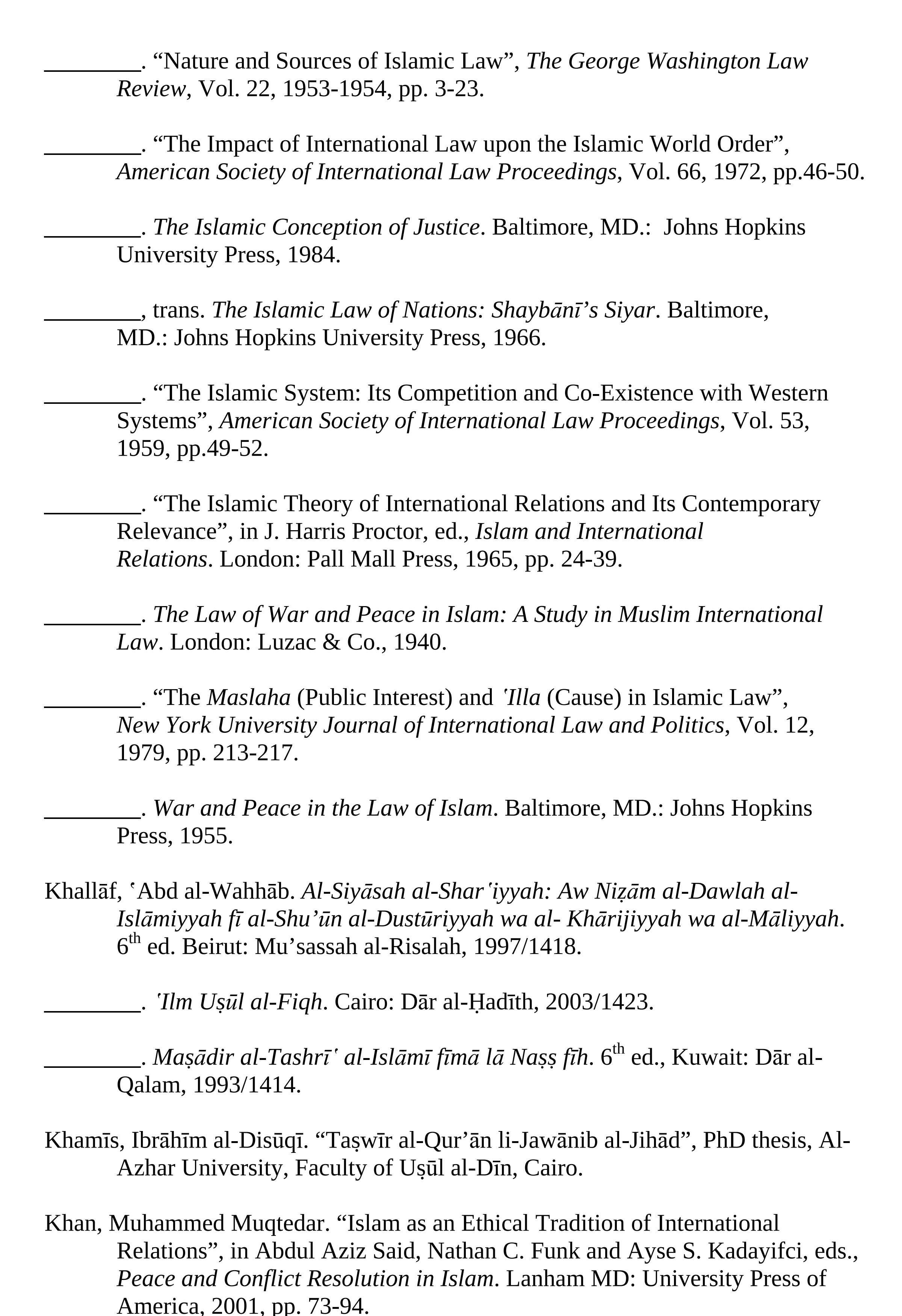

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